

**INTERNATIONAL LAW  
AND MILITARY OPERATIONS**

**CARSTEN**

**U.S. NAVAL WAR COLLEGE**

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STUDIES**

**VOLUME 84**







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Volume 84

## International Law and Military Operations

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Editor



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INTERNATIONAL LAW STUDIES SERIES  
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# Foreword

The International Law Studies “Blue Book” series was inaugurated by the Naval War College in 1901 as a forum for essays, treatises and articles that promote a broader understanding of international law. The eighty-fourth volume of this historic series, *International Law and Military Operations*, is a compilation of scholarly papers and remarks derived from the proceedings of a June 2007 conference hosted by the Naval War College.

The purpose of the conference was to address three areas of interest—law of the sea and maritime security, the law of armed conflict and coalition operations, and the 2006 Lebanon Conflict. Participants came to Newport from twenty-five countries and included government officials, military commanders, representatives of non-governmental organizations, esteemed international law scholars, and military and civilian lawyers. The conference was designed to encourage a constructive dialogue on these issues by examining US and international perspectives to ensure a sensible development of the law, and to preserve both national and collective security imperatives. Undoubtedly the ideas generated in this “Blue Book” volume will contribute substantially to the ongoing examination of the major legal challenges accompanying maritime operations and armed conflict in the twenty-first century.

On behalf of the Secretary of the Navy, the Chief of Naval Operations and the Commandant of the Marine Corps, I extend a warm thank-you to Major Michael D. Carsten, US Marine Corps, under whose leadership this conference was organized, and who served as the editor of this volume. I also wish to thank the authors for their invaluable contributions to this work and for engendering a greater understanding of operational law in the maritime context and of the law of armed conflict generally. Thanks also to the Lieber Society of the American Society of International Law, cosponsor of this conference. And, finally, a very special note of gratitude goes to the Naval War College Foundation, Roger Williams School of Law and *Israel Yearbook on Human Rights*, whose tremendous support made this conference, and, particularly, this International Law Studies volume, possible.

JACOB L. SHUFORD  
Rear Admiral, US Navy  
President, Naval War College



# Introduction

Since its founding in 1884, the US Naval War College has been committed to the study and teaching of the law impacting military operations. As part of its commitment, from June 20–22, 2007 the Naval War College hosted a conference entitled *International Law and Military Operations*. Initiated in 1990, with a conference addressing the targeting of enemy merchant shipping, the international law conference series brings together international scholars and practitioners, experts in military operations and students to examine topical legal issues. Commencing with that inaugural colloquium, the proceedings of and papers from each succeeding conference have been published as a volume of the Naval War College's internationally acclaimed International Law Studies ("Blue Book") series. This "Blue Book" continues that practice.

The conference speakers explored several diverse, yet timely, subjects relevant to the planning and conduct of military operations. These include maritime strategy and the global legal order, the law of the sea and maritime security, the law of armed conflict, maritime enforcement of United Nations Security Council resolutions, coalition operations, and the 2006 conflict in Lebanon. This volume of the International Law Studies series is a compilation of remarks made during the conference and of articles that expand upon the thoughts articulated during the conference.

The conference was organized by Major Michael D. Carsten, US Marine Corps, of the International Law Department, who also served as managing editor of this volume. The conference was cosponsored by the Lieber Society on the Law of Armed Conflict of the American Society of International Law, and was made possible through the support of the Naval War College Foundation, Roger Williams University School of Law and the *Israel Yearbook on Human Rights*. Without the dedicated efforts, support and assistance of these individuals and organizations the conference would not have taken place.

I once again give thanks to Professor Emeritus Jack Grunawalt and Captain Ralph Thomas, JAGC, US Navy (Ret.), who undertook the lion's share of the editing process. Indeed, this edition marks the sixth consecutive "Blue Book" on which they have shared editing responsibilities. Without their tireless efforts and devotion to the Naval War College and to the International Law Studies series, this publication would not have been possible.

Special thanks go to Rear Admiral Jacob Shuford, President of the Naval War College, and Professor Barney Rubel, Dean of the Center for Naval Warfare Studies, for their leadership and support in the planning and conduct of the conference, and the publication of this volume.

The International Law Studies series is published by the Naval War College and distributed worldwide to US and international military organizations, academic institutions and libraries. This “Blue Book” and its predecessors evidence the Naval War College’s long-standing dedication to the scholarly discourse and understanding of legal issues at the strategic, operational and tactical levels.

DENNIS L. MANDSAGER  
Professor of Law & Chairman  
International Law Department

# Preface

Immediately following the conclusion of the conference, Commander Eric Hurt, JAGC, US Naval Reserve, an officer assigned to the reserve unit supporting the International Law Department, expertly prepared a conference summary which captures the highlights of the presentation of each of the conference speakers. The remarks that follow are, with limited editing to conform to the “Blue Book” style, that summary. My thanks are extended to Commander Hurt for this outstanding work; it certainly eased my work as editor.

I also extend my thanks and appreciation to Susan Meyer of the Desktop Publishing Office here at the Naval War College. Ms. Meyer has been responsible for preparation of the page proofs of eight volumes of the International Law Studies series. The high quality of this volume is again testimony to her professionalism and outstanding expertise. My thanks also go to Mr. Albert Fassbender and Ms. Shannon Cole, two superb proofreaders, who are Ms. Meyer’s colleagues in the Desktop Publishing Office. The “final” article that left the International Law Department was a far superior article when it returned from that office.

I encourage readers of this volume to first read the following summary. It will whet your appetite for the individual articles prepared by the speakers and their insightful analyses of many of the challenging international law issues facing military forces today.

## *Keynote Address*

In his address opening the conference, Professor Allen reflected that three decades have elapsed since law of the sea scholar Daniel Patrick O’Connell challenged conventional thinking with his book *The Influence of Law on Sea Power*. O’Connell wrote that the law of the sea is the stimulus to sea power and that future naval operations planning staffs must acquire an appreciation of the law. Professor Allen used this groundbreaking book as the backdrop for a discussion of the development of the new maritime strategy of the United States. During the summer of 2006, the Chief of Naval Operations tasked the Naval War College with developing ideas that will guide the team charged with crafting the new maritime strategy. The new strategy will be nested within the security strategies which emanate from the *National Security Strategy* of the United States. This is not the first time the US Navy has launched a grand strategy development project, but common to all of the

predecessor documents is a lack of express discussion of the role of law and legal institutions in naval operations.

This unanimous agreement on the need to reference international law arises from the role of law as an ordering force. Order is necessary for successful trade, transportation and the interaction of nations pursuing their national interests. Professor Allen observed that the rule sets which bring about this order will not always be voluntarily complied with and that, for that, enforcement must be added. This enforcement requires new ways of thinking. The historical “DIME” construct of diplomatic, information, military and economic methods of engagement must be supplemented by law enforcement, judicial and cultural measures. To achieve these goals within a maritime strategy, Professor Allen advanced the idea that law, as a proven promoter of order, security and prosperity, can be a powerful unifying theme. Law provides the language and logic of cooperation. It is clear that respect for international law and our recognition of such will allow the United States to shape the global and legal orders as a good-faith participant in the system.

### *Panel I – Law of the Sea and Maritime Security*

Rear Admiral Horace B. Robertson Jr., JAGC, US Navy (Ret.), Judge Advocate General of the United States Navy from 1974 to 1976, opened the panel by providing a historical background for the US position on the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention). The United States, as early as 1966, under President Johnson proclaimed that the seas must not be the source of a land grab. This position was reinforced by President Nixon’s 1970 call for a seabed treaty. In 1982, then-President Reagan announced the US opposition to the 1982 LOS Convention, citing the machinery of implementation. President Reagan detailed his specific objections to the treaty. In the time since these objections were registered, they have all been addressed. Despite these remedies, opposition to US accession to the Convention persists.

Rear Admiral Robertson outlined the continuing objections to the 1982 LOS Convention. These objections all appear to be ideological and lack substance. Chief among the opposition’s arguments is that a ratification of the Convention is a surrender of US sovereignty to the United Nations. This is not supported by the text of the document or the machinery used to administer the Convention. Opponents also claim that the United States need not ratify UNCLOS, as customary international law provides all of the same benefits. While customary international law does set forth a legal framework, it does not provide the precision of UNCLOS or the institutions by which to seek resolution of disputes.

The Staff Judge Advocate for United States Pacific Command, Captain Raul (Pete) Pedrozo, JAGC, US Navy, observed that there are many challenges to free navigation of the seas. These challenges include regimes adopted by the International Maritime Organization (IMO), such as establishment of mandatory ship reporting systems and particularly sensitive sea areas (PSSA). These IMO measures have the practical effect of impeding freedom of navigation in designated portions of the ocean. Captain Pedrozo indicated that the National Oceanic and Atmospheric Administration (NOAA) has requested the designation of over 140,000 square miles of ocean surrounding the Northwest Hawaiian Islands as a PSSA. Such a designation, in his view, is not necessary and will pose significant challenges for the US Coast Guard and NOAA to enforcement of the mandatory ship reporting system that will encircle the PSSA. The proliferation of IMO-adopted measures could also adversely impact the operations of the US Navy worldwide.

The Judge Advocate General for the United States Coast Guard, Rear Admiral William Baumgartner, US Coast Guard, spoke on the increasing importance of conditions on port entry as a tool for ensuring maritime security and the need for an analytical structure to evaluate proposed entry conditions. Given the importance of port security, the Coast Guard has developed a comprehensive strategy to combat maritime terrorism called Maritime Sentinel which takes a three-pronged approach: 1) achieving maritime domain awareness, 2) undertaking effective maritime security and response operations, and 3) creating and overseeing an effective maritime security regime. Conditions on port entry, such as advanced notice of arrival for commercial vessels arriving from abroad, are and will continue to be an important part of executing this strategy.

Rear Admiral Baumgartner noted that additional conditions may be added in the future and suggested that the following questions should be asked in evaluating those conditions:

- Will the proposed condition be effective in addressing an issue of significant importance?
- Is there a better, less expensive and less objectionable way to accomplish the same policy goal?
- Will it be consistent with customary and conventional international law of the sea, i.e., does it impinge on important navigational freedoms?
- Does it have a rational nexus in time, place and purpose to the actual entry into port?

The goal of enhancing national security is most effectively met by stopping threats before they reach our shores. Conditions on port entry are one of the most effective tools in accomplishing this but they must be prudent and well considered.

Professor Guifang (Julia) Xue of Ocean University of China observed that China is moving from being a State historically focused on coastal State interests to becoming a maritime State. This move results from China's growth as a major influencer of globalization. The importance of free navigation, as reflected in the 1982 LOS Convention, has caused a reevaluation of China's laws and policies. This reevaluation takes the form of modifying Chinese domestic law to come into compliance with the Convention and working to settle tensions between China and various States, such as Taiwan, Japan and Vietnam.

### *Luncheon Address*

Rear Admiral Schachte began by outlining how opponents of the 1982 LOS Convention have dealt in misrepresentations to defeat its approval by the US Senate. These misrepresentations center mainly on the argument that the Convention will rob the United States of its sovereignty. In fact, there is nothing in the treaty which takes away from the maritime power of the United States. Opponents also claim the Convention will serve as a threat to US freedom of navigation on the high seas. With over one hundred illegal claims against navigation, the 1982 LOS Convention stands as the mechanism which will allow for greater freedom of navigation and the resolution of impediments to movement.

The Convention provides a stable legal environment which improves the US ability to succeed in the Global War on Terror. Despite claims to the contrary, the Convention does not give the United Nations the authority to tax the United States or to board US ships. Accession to the 1982 LOS Convention would give the United States the ability to shape and influence world maritime policy and law. With President Bush's endorsement of the Convention and a large number of senators indicating support, Rear Admiral Schachte expressed hope that the Senate will soon provide its advice and consent, but stressed that party or non-party, a robust freedom of navigation program must continue to be a part of US oceans policy.

### *Panel II – Law of Armed Conflict*

Professor Yoram Dinstein, Professor Emeritus, Tel Aviv University, spoke on direct participation of civilians in hostilities and targeted killings in the context of recent decisions by the Supreme Court of Israel. The principle of distinction—between civilians and combatants, as well as civilian objects and military objectives—is the most basic principle of the international law of armed conflict. Professor Dinstein noted that the definition of military objectives (grounded on nature, location, purpose or use) is very open ended, since every civil object—including a

hospital or a church—is liable to be used by the enemy, thereby turning into a military objective. Hence, the key element in practice is the requirement of proportionality, meaning that—when a military objective is attacked—incidental injuries to civilians and damage to civilian objects must not be excessive in relation to the anticipated military advantage gained. Of course, what is considered excessive is often a subjective assessment made in the mind of the beholder, subject only to a test of reasonableness.

On the subject of direct participation of civilians in hostilities, Professor Dinstein observed that there is a virtual consensus that, at those times when the direct participation is occurring, the individual may be targeted. But what is he in terms of classification? Professor Dinstein believes that the person has become a combatant, and indeed (more often than not) an unlawful combatant. The International Committee of the Red Cross (ICRC), on the other hand, adheres to the view that he remains a civilian (although agreeing that he may be attacked while directly participating in hostilities). The difference of opinion has a practical consequence only when the person is captured. Professor Dinstein takes the position that, as an unlawful combatant, the person loses the general protection of the Geneva Conventions and only benefits from some minimal standards of protection, whereas the ICRC maintains that the general protection of civilian detainees under Geneva Convention IV remains in effect.

Professor Dinstein also addressed the issue of human shields. When a civilian is voluntarily attempting to shield a military objective from attack, he is directly participating in hostilities. As for the involuntary use of civilians to shield military objectives, the act is unlawful and even (under the Rome Statute of the International Criminal Court) a war crime. But what if involuntary human shields are used? Does it mean that the principle of proportionality remains intact, so that the opposing belligerent may be barred from attacking the military objective? This is the position taken by Additional Protocol I of 1977. Professor Dinstein disagrees. In his opinion, under customary international law, the principle of proportionality must be stretched in such an instance and applied with greater flexibility. If the outcome is that a large number of civilians are killed, their blood is on the hands of the belligerent party that abused them as human shields.

Doctor Nils Melzer, of the International Committee of the Red Cross, stressed that in the current conflict against terrorism, there is no defined battlefield. This leads to confusion in distinguishing between civilians and combatants. Civilians enjoy protection under international law until such time as they participate in hostilities. Unfortunately, there is no clarity on what it means to participate. An ICRC/Asser Institute initiative on direct participation seeks to define the term “direct participation” in the context of the concept of civilians, the nature of hostilities and

the modalities of the suspension of hostilities. He defined direct participation in hostilities as action taken by an individual which is designed to have an adverse effect on the military operations of a party.

Doctor Melzer indicated that the duration of this participation is also difficult to quantify. Concrete steps toward the preparation of a hostile act, deployment to commit the act, commission of the act and return from deployment are all considered by the ICRC to be part of the hostile act, and cause civilians to lose their protection under international law. Once these actions are complete, the civilians regain their protected status and are not lawfully subject to attack. As with all combat actions, proportionality must factor into the targeting decision involving the civilian engaged in the commission of a hostile act. Ultimately, if there is any question concerning the status of a civilian, the presumption must be that the individual is protected and not subject to lawful targeting.

Professor David Turns of the University of Liverpool detailed the recent House of Lords decision in the case of *Al-Skeini*. This case involved the deaths of one Iraqi civilian while in British military custody, and five others during British military operations on the streets of Basra. The House of Lords held that an inquiry should be held into the death of a prisoner in custody in Iraq in certain extraordinary circumstances. Such an inquiry is appropriate when the person is within the jurisdiction of the United Kingdom for purposes of British human rights law. This is a fact-specific determination that centers upon whether the individual is in British custody. In this case, the death of the individual who was in British custody requires an inquiry under the law. In situations where individuals are killed and not in British custody, they are not within the jurisdiction of the United Kingdom for human rights law purposes, and therefore there is no requirement for an inquiry. In effect, when the British Army deploys to a foreign country, it takes with it British human rights law which must be applied to those under its control and custody.

In closing, Professor Turns noted that the United Kingdom's legal view of the British presence in Iraq is similar to the position taken with regard to the presence of British forces in Northern Ireland during the "Troubles." In both cases, the British military was invited to aid the existing government and quell unrest; therefore detainees are not prisoners of war under Geneva Convention III, because the conflict is not a war. Professor Turns concluded by arguing that no matter how the Global War on Terror is classified, detainees should be treated either as prisoners of war under Geneva Convention III or in accordance with Common Article 3 of the four 1949 Geneva Conventions and be given the maximum benefit of such treatment.

Ashley Deeks from the Legal Adviser's Office at the US Department of State explained that the United States has engaged in a detailed, ongoing analysis of the

rules pertaining to the treatment and classification of detainees. The rules and policies regarding detainees that the United States put in place in 2002 have evolved considerably, due to input from all three branches of the US government. Under the present regimes in Iraq, Afghanistan and Guantanamo Bay, the detention of individuals is the subject of constant and ongoing review. The United States has taken concrete steps to ensure that detainees are treated appropriately and that their statuses and ongoing detention are reviewed periodically.

Ms. Deeks noted that the situation in Afghanistan is complicated, given the makeup of the coalition involved in operations. Different members of the coalition have different domestic laws and policies concerning detainees. In addition, different countries are signatories to different law of war and human rights treaties. These factors, combined with the difficult-to-classify nature of the operation, make detainee operations challenging. Despite these challenges, the United States has achieved a sustainable detainee regime in Afghanistan.

***Panel III – New Developments in Maritime Enforcement  
of UN Security Council Resolutions***

Professor Alfred Soons, University of Utrecht, opened this panel by raising the question of who may enforce UN Security Council resolutions (UNSCRs). In short, may a non-flag State take action against a vessel outside the national waters of that State? The answer depends on the nature of the Security Council resolution. These resolutions cover many areas, including economic sanctions, counterterrorism, counter-proliferation and peacekeeping. The interpretation of these resolutions can be undertaken by Security Council-established sanctions committees, UN member States, domestic courts and international tribunals. When interpreting these resolutions it is important to note that the UNSCRs are not governed by the Vienna Convention on the Law of Treaties because the resolutions are not treaties. The interpretation must be driven by looking to customary international law and the general principles of law on interpretation. Given the special nature of UNSCRs, it is also helpful to look at the statements of Security Council members in passing the resolution and the prior resolutions and practices of the Council.

Nevertheless, as UNSCRs often involve a potential for incursion into national sovereignty, it is important to take a narrow approach to interpreting the resolution. This may lessen the possibility of an incursion upon sovereignty. If there is significant doubt about the meaning or intent of a UNSCR and its application to particular circumstances, the proper action to take would be to return to the Security Council and ask for a determination as to whether a breach has occurred.

Professor Soons closed by stating that when action is taken in a State's territorial waters, the UNSCR must state explicitly that force is allowed.

Professor Robin Churchill, University of Dundee, Scotland, focused on potential conflicts between UNSCRs and the 1982 LOS Convention. It is clear that UNSCRs may routinely interfere with navigational rights reflected in the Convention. This interference may arise from activities occurring during the enforcement of economic sanctions, prevention of trafficking in weapons of mass destruction (WMD) technology and the prevention of terrorism. These conflicts take place when the Security Council, through a resolution, places limits on what a State may do upon the seas.

Professor Churchill then turned to the question of resolving conflicts between Security Council resolutions and the 1982 LOS Convention. He observed that pursuant to Article 103 of the UN Charter, UNSCRs will always prevail over provisions of that or any other international agreement. When conflicts do occur, Professor Churchill argued that they may be resolved by one of the various dispute settlement bodies, previously chosen by the parties to the dispute under Article 287 of the LOS Convention. Of course, these decisions bind only the parties to the dispute and the rulings have no precedential value. Finally, these dispute resolution bodies may decide the dispute but they have no authority to declare that a UN Security Council resolution is invalid.

University of Central Lancashire Professor Dr. Keyuan Zou observed that China is taking domestic action to comply with international non-proliferation standards and regimes. Force in support of these regimes should be as limited as possible and should be used only when explicitly authorized. Professor Keyuan noted that the 1982 LOS Convention has no provision authorizing the use of force and therefore principles of humanity must be used to resolve conflicts. If force is considered, it must be as narrow a use as possible. In fact, before force may be authorized, it can be argued that the UN Security Council resolution must specifically reference Article 42 of the UN Charter. The use of force in a maritime matter is a law enforcement action, the scope and nature of which must also be controlled by customary international law, rules of engagement and an analysis as to proportionality and necessity. These considerations are all secondary to the consideration of the sanctity of human life and the need to preserve it.

### *Panel IV – Coalition Operations*

Brigadier General Ken Watkin, the Judge Advocate General of Canadian Forces, began by noting that the Global War on Terror is referred to in Canada as the Campaign Against Terrorism. One of the challenges for nations involved in coalition

operations is reaching agreement as to the nature of the conflict. This includes the question of whether you can have an international conflict against non-State actors. International law was designed with the idea that two State actors would be involved in a conflict; however, the majority of contemporary conflicts are internal to a State. At a minimum, there appears to be a consensus that Common Article 3 of the 1949 Geneva Conventions would apply to conflicts such as Afghanistan. Additionally, other treaties will be applicable, but not all coalition partners are bound by the same treaties. For example, Canada and many other nations are bound by Additional Protocol I (AP I) to the 1949 Geneva Conventions, while the United States is not a party to that treaty. Although AP I does not apply as a matter of law to most conflicts, it is integrated into the doctrine of Canadian Forces. This has not presented any significant problems.

Unlike some nations, Canada recognizes the concept of “unlawful combatant.” In examining standards of treatment of unlawful combatants, it is important to rely on both customary international and “black letter” law.

Different legal obligations and approaches sometimes cause friction within coalition operations. This can occur in the area of targeting; however, those perceived differences may not be that great. Canada and the United States have slightly different definitions as to what constitutes a military object. The Canadian definition uses AP I wording and does not incorporate the “war sustaining capability” that the United States brings within its definition. Generally, however, the difference is potentially quite small since Canada, like many other AP I nations, is of the view that in considering proportionality the military advantage to conducting an attack must be considered as a whole and not be limited to individual attacks.

When disagreements arise within a coalition, they must be resolved or the objecting party will not be able to participate in the targeting mission. On other issues, such as the anti-personnel mine Ottawa Convention, problems rarely arise. This is due to the fact that even though most NATO members are signatories and the United States is not, the nature of operations does not lend itself to consideration of the use of the non-command-detonated anti-personnel mines governed by that treaty.

Next, the Director General, Australian Defence Forces Legal Services, Commodore Vicki McConachie, underscored the importance of close coordination among coalition partners. This coordination results from the fact that coalition partners may not all be signatories to the same treaties regarding international law and the treatment of prisoners. In situations where the partners are signatories to the same convention or treaty, they may still have different interpretations of their obligations. These differences must be quickly addressed. Accommodation of the various partners’ responsibilities under both international law and their own domestic

laws is necessary to maintain a coalition. The nature of the current global conflict has created a number of uncertainties. Before the attacks of 9/11, there was some certainty as to which parts of Additional Protocol I to the 1949 Geneva Conventions the United States did not accept. Post-9/11 there is less certainty on this issue, calling for a greater need to coordinate on the proper application of the concepts contained in Additional Protocol I.

Despite these uncertainties, Commodore McConachie feels the United States is still able to reach accord on important issues such as targeting and the applicable rules of engagement. In the event a specific operation violates a coalition partner's legal obligations there must be an "opt out" provision. This provision allows coalition partners to continue their participation in the overall coalition, while not participating in operations which violate their legal obligations. These obligations can be either international or domestic, as Australian forces are subject to all Australian domestic law while deployed in support of coalition operations.

Captain Neil Brown, of the Royal Navy Legal Services, observed that for coalitions to work well there can be no barriers to communication, and that includes the sharing of intelligence. The key approach of staff legal advisers in mission planning is to identify, minimize and thereafter to manage different national legal positions. In planning for the 2003 invasion of Iraq, and despite distinct national positions on the *jus ad bellum*, this collaborative approach all but eliminated substantive differences between the United States and the United Kingdom on the application of international humanitarian law (IHL). The United Kingdom certainly found during the prosecution of the campaign that IHL was entirely appropriate for modern conventional warfare. The fact that US and UK forces operated throughout under their own national targeting directives and rules of engagement was not important. Of much greater significance was the fact that they were applying, in almost every respect, the same law. Some issues were more difficult to resolve, such as the United Kingdom's treaty obligations in relation to anti-personnel landmines used in the "victim-initiated mode," but in the context of the high-intensity warfighting phase of Operation Iraqi Freedom (March–May 2003) none were insurmountable.

In relation to prisoners of war, internees and detainees, a common position on Common Article 3 of the 1949 Geneva Conventions and Geneva Convention IV ensured maximum scope for a coalition approach to the prisoners of war, including their transfer between coalition partners. Although different national approaches were initially taken on the use of lethal force against escaping enemy prisoners of war, a coalition position was agreed which required guards to take into account whether the scale and character of any escape represented an imminent threat to life. Coalition positions in 2003 were developed to reflect Common Article 3 of the Geneva Conventions and Geneva Convention IV requirements, such as the

expedited screening process in advance of Article 5 procedures to determine status. The coalition position was more difficult to sustain when, although United Nations Security Council resolutions maintained the “imperative reasons of security” provision of Article 78 of Geneva Convention IV to intern, some commanders pressed for a wider approach based on the requirement to gather intelligence.

The Legal Counsel to the Chairman of the Joint Chiefs of Staff, Colonel Ronald Reed, USAF, concluded the panel with an approach to coordinating coalition operations. This coordination is designed to reduce the incidental friction that arises between partners. Understanding that this friction is inevitable, he indicated that as much pre-contingency planning as possible should take place. The planning must ensure that operations are based upon defined international law. To the extent possible, rules of engagement should be developed that seek to reconcile partner differences. Identifying pre-contingency coalition forces to react to and deal with certain situations allows for a more efficient deployment of forces. The pre-contingency planning is not a binding set of rules; rather, it is a framework or starting point for dealing with the specifics of certain contingencies.

Once forces are deployed and the coalition is actively engaged, it is imperative that, if multiple rules of engagement are in use, adjacent forces are briefed on and made aware of what those contain. As the coalition begins operations, other incidental friction will arise. This has occurred recently when a coalition partner’s domestic courts conducted investigations of battlefield incidents and then sought to exercise jurisdiction over US soldiers. The United States opposed this, thereby creating incidental friction. While friction will always be present, all possible steps must be taken to minimize it, since legal friction can adversely impact coalition cohesion.

### *Panel V – Lebanon Conflict*

Professor Michael Schmitt, who held the Stockton Chair of International Law at the Naval War College during academic year 2007–08, began the panel with a review of the historical events leading up to the 2006 Lebanon conflict. These events included elections in which Hezbollah gained positions in the Lebanese government; the capture of Israeli soldiers; and rocket attacks launched against northern Israel. The actions of Hezbollah culminated with the Israeli government sending military forces into southern Lebanon.

Professor Schmitt then began the evaluation of Israel’s actions in the context of international law. Israel announced that it was commencing attacks pursuant to a right of self-defense against Hezbollah under Article 51 of the UN Charter. As a precursor to the question of self-defense, it is important to determine the status of

the attacks against Israel. A UN inquiry into the growing conflict found that Hezbollah was part of the government of Lebanon and should be treated as a militia under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War. Lebanon disclaimed affiliation with Hezbollah and stated that Hezbollah was acting independently of the State of Lebanon.

Professor Schmitt noted that the current state of international law on what constitutes State action by a group is in flux. Under the *Nicaragua* decision of the International Court of Justice (ICJ), for a group's actions to be attributed to a State, the State must control and sponsor the group. This decision has been much criticized and does not appear to be consistent with current world reality. Hezbollah was present in the government of Lebanon; it at times had some support from government organs and was in control of much of southern Lebanon. So, while the Lebanese government may not have officially sponsored or controlled Hezbollah, there were significant ties between the State and Hezbollah.

Assuming that Hezbollah was not a State actor for purposes of the attacks on Lebanon, it is clear from the *Caroline* case that non-State actors are capable of armed attacks against States. In fact, 9/11 illustrated that non-State actors are capable of devastating attacks. This was recognized by the world community through its support of the US attacks on the Taliban following 9/11.

Israel was justified in its attacks regardless of the classification of Hezbollah. While there is some ICJ precedent suggesting Israel could not invoke Article 51 absent an attack by a State actor, this position is weak. Article 51 makes no mention of State action as a prerequisite to self-defense and, as the UN Security Council resolutions following 9/11 demonstrate, attacks triggering Article 51 need not be made by a State actor.

Professor Dinstein indicated Israel's action could be classified as extraterritorial law enforcement. Much like the facts of the *Caroline* case, Hezbollah was acting from within Lebanon, Israel asked Lebanon to police its borders in order to prevent Hezbollah's actions, and Lebanon either could not or would not stop Hezbollah, the result being that Israel undertook the policing action itself. States have an obligation to police their territory or risk having their sovereignty violated. Evaluating Israel's self-defense in terms of necessity, immediacy and proportionality shows that Israel's response was appropriate. Israel's action was necessary and immediate, as it was under direct attack. Finally, as to proportionality, Israel's operations were tied to defensive measures to protect itself from rocket attacks by Hezbollah.

Sarah Leah Whitson of Human Rights Watch advised that Human Rights Watch had sent teams of investigators to Lebanon both during and following the conflict. These investigators conducted numerous interviews of members of the

local population, and of representatives of the Israel Defense Forces, Lebanese government, Hezbollah, humanitarian agencies, journalists, hospitals and local officials. The findings of this investigation will be set out in three pending reports examining Israel's and Hezbollah's conduct. The investigation revealed very few instances of Hezbollah using the local population as shields for its attacks on Israel. In addition, very few of Hezbollah's rocket-launching sites and munitions and arms storage facilities were in close proximity to civilian objects. Thus, there were few Hezbollah actions which resulted in civilian deaths.

Colonel Pnina Sharvit-Baruh, Head, International Law Department, Israel Defense Forces, outlined the Lebanon conflict from the Israeli perspective. It was clear from intelligence obtained that Hezbollah was making every effort to blend in with the civilian population. This blending ignored the distinction between civilians and combatants, and resulted in Hezbollah's shielding its military activities with civilians. Israel went to great lengths to limit civilian casualties. Targeting decisions were made so as to always attempt to leave one road open for civilian evacuation. Also, certain dual-use infrastructure was not targeted because it would have had a disproportionate impact upon the civilian population.

Colonel Sharvit-Baruh noted that there were civilian casualties. These casualties were not excessive given the expected military benefit of most of the targets. Targeting was taken very seriously and decisions were made based upon a proportionality review. These decisions were difficult given the nature of the asymmetrical warfare involved while fighting a non-State actor that does not comply with the law of armed conflict.

### ***Conclusion***

In closing, it is our sincere desire that the works of the preeminent practitioners, scholars and leaders who contributed so graciously to this volume assist those seeking answers to today's hard questions and propagate thoughts and action that shape the course of the future.



# **PART I**

**LAW OF THE SEA AND MARITIME SECURITY**



# I

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## The Influence of Law on Sea Power Doctrines: The New Maritime Strategy and the Future of the Global Legal Order

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Craig H. Allen\*

For much of the 2006–07 academic year, elements of the US Naval War College facilitated an elaborate process designed to provide the intellectual foundations for the Chief of Naval Operations (CNO) and his staff to draw upon in drafting a new maritime strategy.<sup>1</sup> The process brought together experts from throughout the world to take part in workshops, strategic foundation “war” games, conferences and listening sessions.<sup>2</sup> It was my privilege as the Charles H. Stockton Chair of International Law to serve as legal advisor throughout the process. This article summarizes the contributions of the Naval War College International Law Department (ILD) in the process to develop and define the relationship between maritime strategy and law, particularly international law, and provides the author’s thoughts on what course that strategy should take.

Three decades have now elapsed since Daniel Patrick O’Connell challenged our thinking with his book *The Influence of Law on Sea Power*.<sup>3</sup> In it, the New Zealand law of the sea expert and Chichele Professor of Public International Law argued, shortly before his death in 1979, that because the law of the sea “has become the stimulus to sea power, not its restraint,”<sup>4</sup> future naval operations planning staffs

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must acquire a thorough appreciation of the law.<sup>5</sup> In contrast to Admiral Alfred Thayer Mahan and the more recent naval historians who, while providing illuminating analyses of the influence of sea power on history,<sup>6</sup> mostly disregard the influence of international law on sea power, Professor O'Connell forcefully argued that sea power doctrines can no longer be considered in isolation from the relevant law. More importantly, O'Connell recognized that international law can be a powerful strategic enabler. The question I asked myself as I launched into my new task last fall was, "Has the naval strategy community heeded Professor O'Connell's admonition?" Let me attempt to answer that question by taking the reader on a brief tour of our maritime strategy development process and the role of law and legal advisors in that process.

### *The Maritime Strategy Project*

At the June 2006 Current Strategy Forum, Admiral Mike Mullen, one year into his tenure as CNO (and one year before his nomination as Chairman of the Joint Chiefs of Staff), called for the development of a new maritime strategy to guide the maritime services in the coming years.<sup>7</sup> It is to be a strategy of this age and for this age. The new strategy document, *A Cooperative Strategy for 21st Century Seapower*,<sup>8</sup> developed under the overall leadership of Vice Admiral John Morgan, Deputy Chief of Naval Operations for Plans and Strategy (N3/N5), joins several other naval capstone planning documents, including *Sea Power 21*,<sup>9</sup> which, together with *Marine Corps Strategy 21*,<sup>10</sup> provides the vision that establishes the strategic ends; the *Navy Strategic Plan*, which lays out the ways and means to achieve the vision;<sup>11</sup> the CNO-CMC *Naval Operations Concept*, which addresses the operational principles that will be used by the services;<sup>12</sup> and the US Coast Guard *Strategy for Maritime Safety, Security, and Stewardship*.<sup>13</sup> At the June 12–13, 2007 Current Strategy Forum, the Commandants of the Marine Corps and the Coast Guard announced their readiness to join the CNO in signing the new maritime strategy when it is completed, making it a true strategy of all three sea services.<sup>14</sup> In the summer of 2006, the CNO tasked the Naval War College to act as broker for an ordered competition of maritime strategy ideas—ideas that would inform and guide the carefully selected team charged with drafting the new strategy. It was made clear from the start that there were no preconceived ideas and that no suggestions were to be off limits. The War College was also asked to facilitate a conversation with the country—indeed with the world—to describe our process and solicit feedback.<sup>15</sup>

### *Security Strategies in the United States*

We were not asked to compose the new strategy on a blank canvas. Indeed, we worked on one that was already suffused with an elaborate landscape. The new maritime strategy will be nested in what has become a multifaceted web of security strategies for the nation, all of which emanate from the *National Security Strategy of the United States*.<sup>16</sup> The National Security Act of 1947, as amended by the Goldwater-Nichols Act of 1986, requires the President annually to submit to the Congress a National Security Strategy (NSS) report.<sup>17</sup> The President's NSS vision is in turn implemented by the *National Defense Strategy* promulgated by the Secretary of Defense and the *National Military Strategy* issued by the Chairman of the Joint Chiefs of Staff.<sup>18</sup> Closely related to those are the *National Strategy for Maritime Security*, the *National Strategy for Homeland Security*, the *Maritime Strategy for Homeland Security*, the *National Strategy for Combating Terrorism* and the *National Strategy to Combat Weapons of Mass Destruction*. Not surprisingly, many of the strategy documents have classified versions.

I should add that this was not the first time the US Navy has launched a grand strategy development project. Indeed, research by the Center for Naval Analyses in the fall of 2007 identified at least seventeen Navy capstone planning documents since the 1970s.<sup>19</sup> It is noteworthy for this observer that none of the earlier Navy capstone strategies, or Naval Doctrine Publication 1 on *Naval Warfare*<sup>20</sup>—which “introduces who we are, what we do, how we fight, and where we must go in the future”—expressly discusses the role of law and legal institutions in naval operations, other than to make a passing reference to the fact that naval mobility would be better assured if the United States acceded to the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention).<sup>21</sup>

### *Strategy as a Critical Component of the Geo-strategic Environment*

Strategy is said to be “a prudent idea or set of ideas for employing the instruments of national power in a synchronized and integrated fashion to achieve theater, national, and/or multinational objectives.”<sup>22</sup> In setting out to achieve those national objectives, strategy must be adapted to the strategic environment in which it will operate.<sup>23</sup> Accordingly, to provide the development team with the foundation they needed to prepare maritime strategy options for the CNO, the Naval War College began by convening a Geo-strategic Environment Workshop. The workshop participants drew heavily on the National Intelligence Council assessment “Mapping the Global Future.”<sup>24</sup> Later, a British perspective was provided by the UK Ministry

of Defence Development and Concepts Doctrine Centre’s “Strategic Trends 2007–2036.”<sup>25</sup> The experts’ conclusions were sobering.<sup>26</sup>

The reader is likely familiar with much of the strategic environmental picture, so I will only summarize the most salient features. Geopolitical entropy, disorder and uncertainty are on the rise.<sup>27</sup> The world is said to be suffering from a global security deficit.<sup>28</sup> Unsustainable population growth rates, the “youth bulge” and chronic unemployment are most pronounced in those regions lying in the so-called arc of instability. State sovereignty and territorial integrity are on the decline.<sup>29</sup> State powers are increasingly diffused and devolved. Many States, even some of the most developed States, are besieged by an unrelenting flow of illicit weapons, drugs, money and migrants across their borders. At the same time, through what some have described as the democratization of violence and of technology,<sup>30</sup> States have lost their historical monopoly on the large-scale use of force and on access to weapons of mass destruction (WMD) technologies.<sup>31</sup> Indeed, the global picture looks much the same as it did in 1921, when William Butler Yeats penned his apocalyptic poem *The Second Coming*:

Things fall apart; the centre cannot hold;  
Mere anarchy is loosed upon the world,  
The blood-dimmed tide is loosed, and everywhere  
The ceremony of innocence is drowned;  
The best lack all conviction, while the worst  
Are full of passionate intensity.

Grim verses, indeed, whose dark and disturbing images still ring true.

Economic security is widely recognized as a vital interest of the State.<sup>32</sup> Yet, present efforts are not sufficient to meet basic security needs even within the borders of many States, let alone provide the kind of stability needed by the globalized, interdependent and tightly connected economy of the twenty-first century. Contemporary security strategies must be designed to manage threats to the public order. Those threats come from States and non-State actors. We are painfully aware that the threats know no geographical boundaries, particularly as globalization increases the porosity of borders. Accordingly, the threats must be detected and managed in the commons, at boundaries between the commons and States, and along the borders of adjacent States.

In an age when the international supply chains that sustain the global economy and the seas over which those chains are carried are the common concern of all States, global order—including order on the sea—is the new *raison d'état* and must be the goal of every maritime security policy and strategy. Irresponsible and

incompetent flag States; failing and failed States; transnational terrorist organizations; criminal syndicates engaged in trafficking in weapons, drugs and humans; and illegal, unreported and unregulated fishing all undermine order in the commons. Here in the global commons, where the pinch from flag States falling short in their responsibility to “effectively” exercise jurisdiction and control over their vessels is felt most acutely,<sup>33</sup> the security deficit is most urgent.

### *The Strategic Foundations Games*

Following the August 2006 Geo-strategic Environment Workshop, a series of executive group meetings and war games were conducted in September and October of 2006 to develop strategic foundations for use in the Maritime Strategy Options Development Workshop in December. Those options were later vetted through the Options Refinement Decision Support Event in February of 2007. The International Law Department provided legal advice to all of the war game teams and to two of the executive groups. Early on in the process, it also provided a brief to the Red Team Executive Group suggesting possible “lawfare” strategies and tactics that might be used against the Blue Team.<sup>34</sup> During this same period, the Naval War College hosted a conference on the maritime implications of China’s energy strategy,<sup>35</sup> an Intercessional Conference on Maritime Strategy and a workshop entitled Economics and Maritime Strategy: Implications for the 21st Century.<sup>36</sup> ILD attended each of the events and an ILD member (the author) participated in the Economics and Maritime Strategy Workshop, submitted a paper on legal interoperability challenges and made a presentation on international cooperation in securing the maritime commons.<sup>37</sup>

### *The Future Global Legal Orders Workshop*

Let me now turn to something of greater interest to readers of this volume, all of whom will likely appreciate that law—that is, rule sets, legal processes and international institutions<sup>38</sup>—is as much a part of the geo-strategic environment, and therefore the planning “context,” as geography, energy, demographics, organizational culture and technology. The international system consists principally of sovereign States, who collectively comprise a horizontal, non-hierarchical global order that has historically been described as one of moderated anarchy, at least by the realists.<sup>39</sup> Conventional wisdom posits that within that system, international institutions and organizations ameliorate the anarchy, but with few exceptions they do so without altering its horizontal structure.

The experts who participated in the Geo-strategic Environment Workshop exhibited little faith in existing international organizations and in international law. Three sample findings demonstrate the depth of their skepticism. First, they concluded that “some international organizations are looking long in the tooth and incapable of coping with emerging challenges.” Next they concluded that “some of the institutions that are charged with managing global problems may be overwhelmed by them” and “the number of bilateral agreements will rise as international organizations continue to fall short in their objectives.” Given the experts’ harsh judgment of international organizations and regimes, their prescription, “International Organizations: out with the old, in with the new,” should not surprise you.

The Workshop experts’ conclusions added credence to the view that international law is merely “epiphenomenal.”<sup>40</sup> What really affects State behavior is State interests—that is, the underlying economic and political factors.<sup>41</sup> Legal academics have expressed related doubts about international law. International lawyers no doubt recall John Austin’s nineteenth-century conclusion that international law was not positive law at all, but rather a body that partakes more of a moral obligation, violation of which may provoke the hostility of other nations but not the kind of sanctions that attend violation of laws promulgated by a sovereign.<sup>42</sup> And H.L.A. Hart famously observed that because international law lacks the formal structure of legislative courts with compulsory jurisdiction and official sanctions it is far more primitive than the municipal law enacted by a sovereign.<sup>43</sup>

The Workshop report left some of us wondering whether their views were shared by international law experts. Mindful that the state of the future global legal order is a vital component in the geo-strategic environment, the President of the Naval War College convened a two-day workshop that brought forty-two legal experts together to examine the global legal order in 2020.<sup>44</sup> Those experts were asked to provide the legal component that is too often neglected in strategy documents.

With few exceptions, military strategists have a long history of giving short shrift to international law in their writings.<sup>45</sup> The origin of the problem can be traced back to Carl von Clausewitz, who dismissively referred to those “certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom.”<sup>46</sup> George F. Kennan, the leading architect of America’s Cold War containment security strategy, is also remembered for his attack on what he saw as an excess of “legalism and moralism” in American foreign policy during the Wilson presidency years.<sup>47</sup> Regrettably, international lawyers have not always done their part to engage with strategy planners, to help them forge plans that can achieve strategic goals while respecting and even advancing the rule of law. The experts who came to Newport were ready to do just that, in the hope that the strategists were ready to listen.

And what a distinguished group they were. They came to Newport from Argentina and Australia, from Canada and Chile, and from India, Indonesia and Italy. In all, they represented eleven countries. They were law professors; international law specialists from the US Departments of State, Justice and Homeland Security and the Center for Naval Analyses; a Chinese law of the sea scholar; senior legal advisors to the Indian Coast Guard and the Italian Navy General Staff; the legal counsel to the US Chairman of the Joint Chiefs of Staff; senior judge advocates for the US Marine Corps, Coast Guard, and several combatant and fleet commands; and the Director of the UN Division for Ocean Affairs and the Law of the Sea. They brought backgrounds in international security law, law of the sea, arms control and proliferation, the law of armed conflict, international transportation law, international criminal law and international organizations.

The Workshop began with a brief discussion of some assumptions proposed by the conference chair concerning the role and reach of law.<sup>48</sup> The first was the pragmatic observation that the new maritime strategy must be adapted to the global legal order in which it will function. The second was that a robust and respected legal order has the potential to save lives, by providing predictability and preventing conflicts, and by providing effective and peaceful means to resolve conflicts that do arise. The third assumption was that, while the future state of the legal order is uncertain, it can, to some degree, be mapped and shaped, and—as Thomas Friedman reminds us—“the future belongs to the shapers and adapters.”<sup>49</sup>

To avoid what the influential British strategist Colin Gray labels the “sin of presentism,”<sup>50</sup> the legal experts attempted to widen their temporal lens by exploring several “alternative futures,” using the scenario-planning method championed by futurists like Peter Schwartz and Philip Bobbitt.<sup>51</sup> They initially discussed six strawman scenarios that would collectively map the future global legal order, before adopting an approach that focused on twelve areas of potentially significant changes in the legal order. For each of the twelve areas, the experts examined the possible trends in the rule sets, legal processes and institutions, and in compliance levels. Next, they were asked to consider the consequences of those changes to the maritime strategy mission inventory and for the means and methods for carrying out those missions. Finally, they were asked what the new maritime strategy should say—and not say—about international law.

One would expect that forty-two lawyers from eleven different nations would find little on which to agree. To some extent, that was the case with this group. There was, however, one question on which every expert agreed: the new maritime strategy should include an express reference to international law. As one expert put it, international law “is the foundation on which we operate; it is why we are there.”

### *The Role of Law in the New Maritime Strategy*

As the legal experts concluded, there are a number of compelling reasons to embrace the rule of law in the new maritime strategy and no sufficient reason for failing to do so. The new strategy must be consistent with higher-level security strategies. The 2006 *National Security Strategy* of the United States expressly cites the importance of enforcing the rule of law.<sup>52</sup> Similarly, the presidential directive on national maritime security made it clear that in developing the *National Strategy for Maritime Security* (NSMS) the United States will act consistently with international and US law.<sup>53</sup> The NSMS opens its chapter on “strategic objectives” by quoting the presidential directive to “take all necessary and appropriate actions, consistent with U.S. law, treaties, and other international agreements to which the United States is party . . .”<sup>54</sup>

But even if the higher-level strategy documents were silent on the role of law, a maritime strategy that acknowledges the importance of law as an ordering force and a unifying theme for the crucible of international relations—in short, the “centre” Yeats longed for—will be far more compelling and durable. Such a document would also be a source of pride and inspiration for the members of our armed forces, a confidence-building measure for our friends and allies, and a key enabler in our ability to shape the future global order.

### *Law as an Ordering Force*

The United States has a long tradition of calling upon international law when it serves the national interest.<sup>55</sup> In the late eighteenth and early nineteenth centuries, the infant republic raised international law objections to Great Britain’s boarding of US vessels on the high seas and impressment of US sailors into the Royal Navy, and against the Barbary States for piratical attacks on US merchantmen in the Mediterranean Sea and its approaches. Two other disputes between the United States and Great Britain—leading respectively to the *Caroline* exchange of notes and the *Alabama* arbitration award—produced enduring international principles well known to the readers of this volume.<sup>56</sup> More recently, the nation invoked international law against Iran for breaching the inviolability of the US embassy in Tehran and holding US diplomatic personnel and other citizens hostage, and against the People’s Republic of China for its conduct when a US Navy EP-3 was forced to land on Hainan Island following a midair collision with a Chinese fighter.

Although national interest is surely the midwife of security policy and strategy,<sup>57</sup> at the same time States have repeatedly demonstrated their willingness to cooperate with other States to achieve shared goals or resolve common problems.

Globalization and its just-in-time and just-enough logistics imperatives have fundamentally altered the strategic calculus, virtually mandating a cooperative approach to maritime security. Accordingly, the new maritime strategy must be mindful of national interests while remaining ever alert to shared interests. A strategy that narrowly focuses on national interests will surely reinforce existing perceptions of the United States and drive away potential partners. By contrast, it takes but little imagination to see that a new maritime strategy that defines and articulates in compelling terms a framework for achieving shared goals and joint solutions to common problems is much more likely to make other States want to flock to the nascent 1,000-ship multinational navy.<sup>58</sup>

Finding common ground among national interests should not be difficult. For some, the need to promote and protect the international trade and transportation system on which the globalized and energy-hungry world depends is a vital national interest.<sup>59</sup> It is also a shared interest. In the words of some, “commerce craves security.” For other States, particularly those in West Africa, South America and Southeast Asia, protecting offshore fisheries from poachers is not merely a pursuit of profit; it is a survival imperative. Still other States consider threats to the environment as national “security” issues. Consider, for example, small-island developing States, for whom global warming and its attendant rise in the sea level present an existential threat. A strategy that promotes sustainable and equitable access to marine living resources and protection of the marine environment is sure to have broad appeal. At the same time, however, none of these interests can be obtained if the larger system is fraught with disorder and violence. In Abraham Maslow’s hierarchy of human needs, the need for security is exceeded only by basic needs, e.g., food.<sup>60</sup>

Professor Colin Gray asserts that “order is the prime virtue; it is the essential prerequisite for security, peace, and possibly justice. Disorder is the worst condition.”<sup>61</sup> There is, in the minds of many, no longer a “war” to be won, only security to be secured, extended and maintained, so that war can be prevented. The spread of terrorism and weapons of mass destruction threatens chaos, as effective power shifts away from States to non-State actors and super-empowered individuals. To the extent that civilization rests in part on the control of violence, and the growing capacity of non-State actors to inflict such violence now casts a menacing shadow over the planet, the role of law as the deep stratum undergirding international security becomes more apparent and more urgent. Law has the potential to serve as the indispensable binding force to check and perhaps reverse our social and institutional entropy. If the States’ grip on law lessens, and States become increasingly prone to use military force, the binding force so vital to civilization may be fatally weakened.

In a geo-strategic environment everywhere characterized by growing uncertainty, rapid change and instability, rule sets can promote greater predictability and stability. At the same time, rule sets are not legal pixie dust that miraculously brings order where there was once chaos. They must be given the level of respect and enforcement necessary for credibility or no State will be willing to rely on them. Rule sets like the UN Charter, the 1982 LOS Convention, anti-terrorism treaties and the non-proliferation regime can increase order, but only if they are complied with.

We recognize that not all States and non-State actors will voluntarily comply with the rule sets, whether the rules under consideration are those relating to non-aggression and non-proliferation or to trafficking for profit. If voluntary compliance falls short, we must of course redouble our efforts to rebuild it to the level necessary for public order. That may come through education, inducement, deterrence, or capacity building of States, or of global or regional international organizations.<sup>62</sup> But make no mistake, while each of these approaches will be vital to long-term success, they will likely never be sufficient unto themselves to provide the needed level of security in the coming years. For that, we must add enforcement.

Because law is not self-executing, no security strategy should be founded on unrealistic expectations regarding the influence of law on States (let alone on non-State actors) in the conduct of their foreign and military affairs—particularly when survival or vital State interests, or “fundamental” religious beliefs, are at stake. Nor should we delude ourselves about the effectiveness of international organizations in preserving or restoring peace and security. Yet, even if, as Thomas Hobbes warned, “covenants, without the sword, are but words and of no strength to secure a man at all,”<sup>63</sup> even the most committed contrarian would not counsel us to turn our backs on covenants. International law and international organizations like the United Nations will never be more effective or influential than the leading States allow them to be.<sup>64</sup> If the new US maritime strategy ignores the role of either, we diminish the importance of both and undermine their effectiveness. The result will be a less ordered and less secure world. For that reason, it is vital that the maritime strategy provide a rule-based approach for enforcing the global legal order.

In considering enforcement approaches I suggest that effective enforcement of global rule sets will require a new way of thinking that transcends the so-called “DIME” construct. The DIME approach, which looks to the State’s diplomatic, information, military and economic “instruments of national power,” is too narrow for a global environment in which non-State actors pose significant, even cataclysmic, risks to States.<sup>65</sup> This Cold War artifact, which is currently taught at US war colleges, assumes that only a narrow set of instruments is available and that they

will be used against States.<sup>66</sup> In the post–Cold War, post–9/11, post–Bali, Madrid, London subway and Lebanon 2006–2007 world, it is clear that instruments of national power will increasingly be used against non-State actors, like Al Qaeda, Hezbollah and transnational criminal syndicates, and that the DIME approach is not always well suited to them. The United States already reaches well beyond the DIME framework, using a variety of leadership, managerial, institutional, cultural, technological, law enforcement, judicial and financial measures, such as freezing assets.<sup>67</sup> Some of the rule violations that threaten public order are and will remain “M” (military) issues. But many are “enhanced L” (law enforcement) issues, calling for enhanced law enforcement measures.<sup>68</sup> This broader, “DIME-plus” framework will be vital to any maritime strategy—certainly for the Coast Guard and other interagency players with maritime safety and security missions. The new strategy must also acknowledge that without the Coast Guard, US maritime forces will not have a seamless approach to maritime security, for without it the strategy will lack the only alternative “end game” to killing your adversaries or detaining them on remote islands: arresting and prosecuting them. The Coast Guard puts the “L” factor in what is otherwise a limited DIME tool kit for addressing many of our maritime security problems. The next strategy must adapt itself accordingly.

### *Law as a Unifying Theme*

Several of the outside experts engaged in the maritime strategy development process hosted by the Naval War College highlighted the need for the new document to include a “compelling narrative” that will ensure it is read, studied and implemented. How do you select a theme that will counter the scores of centrifugal forces, unify the elements of the strategy, and serve as the leadership spark and catalyst to bring together the three maritime services with overlapping yet unique identities, the other interagency players so essential to the mission, and international friends and allies, while at the same time winning over or at least muting intergovernmental and non-governmental organizations? I suggest that law and its proven, albeit imperfect, capability to promote order, security and prosperity can be a powerful unifying theme and force in the new maritime strategy in the globalized, media-sensitive world in which we find ourselves. In fact, the new strategy has the potential to go a long way toward rehabilitating the reputation of the United States as an overweening hegemon that has become tone deaf to the concerns of its allies.<sup>69</sup>

Global security requires global cooperation and, for many, law provides the logic and language of cooperation. Adherence to shared rule sets can be an effective unifying force. Some would go so far as to say it is now embedded in the cosmopolitan DNA. For that reason, an explicit embrace of the rule of law could prove to be

one of the most attractive features of the new maritime strategy for the Navy's interagency and international partners. Promotion and implementation of rule sets would give the strategy internal coherence and broad external appeal. Any strategy that downplays, or still worse denigrates, international law and international organizations, as does the current *National Defense Strategy* of the United States, ill serves the nation's long-term interest. Much of the world still considers the United Nations the primary if not sole source of legitimacy for the use of force. A strategy that suggests that military force will be deployed in a manner that some will conclude violates the UN Charter, which prohibits the use of force or even the threat to use force against the political independence or territorial integrity of a State, will further isolate the nation.

The importance of common rule sets, based on international law as a unifying force in combined operations, will not be lost on those who observed the evolution of the Proliferation Security Initiative (PSI) and the recent UN Security Council resolutions on proliferation threats to international peace and security. Both make clear that most of the world will insist on an approach that respects international law.

Early positions taken by then–Under Secretary of State John Bolton at the July 2003 PSI-participating States' meeting in Brisbane suggested that with respect to legal justifications for PSI boardings, the United States was “taking nothing off the table,” including the Article 51 right of self-defense. That was understood by some as advocating a position on boarding foreign flag vessels believed to be transporting weapons of mass destruction that might go beyond what current international law permits. At their meeting in Paris three months later, several of the PSI-participating States responded to the US opening position with a call for all participating States to subscribe to a common Statement of Interdiction Principles. The two-page statement eventually adopted at that meeting, and still in force, twice expresses the participating States' commitment that PSI activities will be carried out in a manner consistent with international law. Similarly, Security Council Resolutions 1540, condemning proliferation of weapons of mass destruction to or by non-State actors, and 1718, applying similar prohibitions to North Korea, both tie any enforcement measures to the applicable rules of international law.

### *Law and the Expectations of Our Partners*

Admiral Harry Ulrich, Commander, US Naval Forces Europe, espouses a relatively simple formula for the global war on terrorism: have more partners than your adversaries have. The reasons are elementary. The struggle against disorder knows no flag. Waging that struggle has become a team sport. Vice Admiral Morgan has been

the leading voice for the 1,000-ship multinational navy/Global Maritime Partnership, a concept designed to attract the kind of partners Admiral Ulrich seeks. Does the Global Maritime Partnership (and the Global Fleet Station initiative<sup>70</sup>) need a unifying global maritime strategy that promises to respect the rules of international law? Many of the potential 1,000-ship-navy partners think so.<sup>71</sup>

In their response to the November 2005 “1,000 Ship Navy” article by Admirals Morgan and Martoglio,<sup>72</sup> the naval commanders of France, Ghana, India, Portugal and Spain all referred to the rule of law or legal considerations.<sup>73</sup> The French commander, for example, observed that any 1,000-ship-navy operations must be “in full compliance with the UN Convention on the Law of the Sea . . . .” Portugal expressly referred to the “rule of law,” and India asked whether the 1,000-ship concept should be established under the aegis of the United Nations. Admiral Soto of the Spanish Navy observed that “[t]ogether we must find a *legal* solution to preserving the natural flow of friendly maritime trade while denying freedom of action to those criminals who attempt to use the maritime space for illegal activities.” It seems clear that respect for international law has the potential to unite or fracture the embryonic 1,000-ship navy.

One year later, many of those same foreign CNOs were asked to respond to Admiral Mullen’s plan for a new US maritime strategy.<sup>74</sup> Once again, international law figured prominently in several of the responses. The Commandant of the Brazilian Navy urged that the new strategy “be guided by principles sanctioned by international law,” a view shared by the Secretary General of the Peruvian Navy and the Portuguese Navy Chief of Staff. Their counterpart in Colombia emphasized the need for an “international legal mechanism of cooperation.” Uruguay’s reply was also directly on point: “Multilateral cooperation among navies is legitimate activity when it is based on the law.” The Commander of the Lebanese Navy cited the 1982 LOS Convention and cautioned against the United States acting alone, while the new Chief of Staff for the Spanish Navy highlighted the need for the US Navy “to operate alongside its allies in accordance with international law.” The Australian Maritime Doctrine elegantly and forcefully captures the central importance of law and legitimacy for one of America’s most respected partners:

Australia’s use of armed force must be subject to the test of legitimacy, in that the Government must have the capacity to demonstrate to the Parliament and the electorate that there is adequate moral and legal justification for its actions . . . . [T]his adherence to legitimacy and the democratic nature of the Australian nation state is a particular strength. It is a historical fact that liberal democracies have been more successful in the development and operation of maritime forces than other forms of government, principally because the intensity and complexity of the sustained effort

required for these capabilities places heavy demands upon a nation's systems of state credit, its technological and industrial infrastructure, and its educated population. Sophisticated combat forces, in other words, depend directly upon the support of the people for their continued existence.<sup>75</sup>

Finally, a bit closer to home, in the 2007 US Coast Guard *Strategy for Maritime Safety, Security, and Stewardship*, the Commandant of the Coast Guard, who you will recall will be asked to join in the coming maritime strategy, has clearly identified the need to update and strengthen maritime regimes to address emergent threats and challenges and to support US ocean policy. More specifically, the Commandant has concluded that the “nation needs a set of coordinated and interlocking domestic and international regimes that . . . balance competing uses within the maritime domain” and that “[s]trengthened rules, authorities, and agreements . . . enable consistent, coordinated action on threats and provide an acceptable framework of standards that facilitate commerce and maritime use.”<sup>76</sup> The lessons seem plain: a Navy-led maritime strategy that similarly acknowledges the important contributions of rule sets to promoting public order is far more likely to attract the support of international and interagency partners.<sup>77</sup>

### ***Law and Our Opportunity to Shape and Influence***

Serious students of international law and relations understand that the law is not complete, nor is it perfect. We also know that it can and will be influenced, adapted, developed, clarified and explained—in other words, shaped—in the coming years. Who will be most influential in the law development enterprise? Those who embrace the rule of law, while working to remedy its shortfalls, or those who sullenly turn their backs on the enterprise?<sup>78</sup>

In his 2006 Current Strategy Forum remarks, Admiral Mullen cited as two of the nation’s three enduring naval strengths the capacity to “influence” and “to build friends and partners.” The legal experts had something to say about both. There seemed to be widespread agreement among the experts that it is not enough to simply know and follow the rules of international law; there is also an urgent need to shape those rules.<sup>79</sup> For example, leadership on freedom of navigation and overflight—for warships and military aircraft and the commercial vessels and aircraft on which the global economy depends—will be crucial in the coming years. Some experts’ assessments reveal the magnitude of the coming challenge to shape international maritime law on navigation issues:

- 38 percent of the experts believe that the regime for innocent passage in the 12-mile territorial sea will not remain stable between now and 2020. When they

were asked the same question about transit passage through international straits and archipelagic sea lanes passage, the numbers went up to 41 percent and 51 percent respectively.<sup>80</sup>

- 95 percent of the experts believe that in the coming years more States will claim the right to exercise jurisdiction and control over military activities in their 200-mile exclusive economic zones.<sup>81</sup>

To lead on freedom of navigation and overflight, or any other law of the sea issue, it is crucial that the United States become a party to the 1982 LOS Convention and participate in the United Nations' annual law of the sea processes. Moreover, to encourage others to respect those parts of the rule set about which we are most concerned—the navigation rights of warships and military aircraft and the non-proliferation regime, for example—we must be clear that we respect the entire rule set,<sup>82</sup> as consented to by each State, including the provisions that might seem less important or even “quaint” to us. We cannot hope to “shape” the global or regional legal order unless we are a good-faith participant in the system. After all, why would any State acquiesce in letting us help define a rule set if they know that we intend to later exempt ourselves from it?

At the same time, there is growing concern that law is increasingly used by less powerful States and by non-State actors as an asymmetric instrument to discredit or otherwise balance against more powerful States, even proclaiming that less powerful States are not bound by the same rules.<sup>83</sup> It has been observed that less powerful States respond to sea control strategies by more powerful adversaries by employing sea denial strategies and tactics. Naval mines commonly come to mind,<sup>84</sup> but lately “lawfare” strategies seek to restrict the navigation rights and freedom of action of powerful States by exerting pressure on them to bind themselves to new legal regimes,<sup>85</sup> or by employing existing legal regimes to discredit the more powerful State. As Professor Davida Kellogg at the University of Maine has argued forcefully, the response to such tactics must not be a reflexive denigration of law, but rather a decisive and well-reasoned rejoinder that unmasks this abuse of the law.<sup>86</sup>

The new maritime strategy will almost certainly have an *effect* on the law by what it says—or does not say—about the role of law in modern maritime security operations.<sup>87</sup> In a system where international law is made in part by State practice, navies *make* international law every day by what they say and what they do. At the same time, and for the same reason, the strategy’s treatment of law will affect the ability of the United States to influence the future direction of international regimes and organizations. The Navy can create or ease friction by what it says or does not say about the law in the new strategy and enhance or erode its credibility and therefore its effectiveness as a shaping influence.<sup>88</sup>

*Law's Role in Preserving and Enhancing the Service Ethos*

At an early Naval War College session involving veterans of prior Navy maritime strategy drafting teams, Professor Roger Barnett spoke of the importance of understanding the Navy's culture in crafting any capstone strategy document. That culture, it seems to me, plainly includes a deep appreciation for international law. In describing the most desirable qualifications for a naval officer, Captain John Paul Jones wrote more than two hundred years ago that the "naval officer should be familiar with the principles of International Law . . . because such knowledge may often, when cruising at a distance from home, be necessary to protect his flag from insult or his crew from imposition or injury in foreign ports."<sup>89</sup> US Navy Regulations have long codified the requirement for its members to comply with international law.<sup>90</sup> Compliance is facilitated by a proactive training and education program.

International law was among the first subjects taught in the opening days of the Naval War College in 1884 and the Naval War College is still the only war college in the United States to have a dedicated International Law Department. The first civilian to join the Naval War College faculty was James R. Soley, appointed in the foundation year of the College to teach international law. In 1901, the well-known publicist John Bassett Moore joined the faculty as a professor of international law and later initiated the College's International Law Studies ("Blue Book") series. The first academic chair at the Naval War College was the Chair in International Law, established on July 11, 1951, and filled by Harvard's Bemis Professor of International Law and Permanent Court of International Justice Judge Manley O. Hudson. In 1967 the chair was named in honor of Rear Admiral Charles H. Stockton, an international law scholar and former president of the Naval War College.

Our personnel have a right to expect that their capstone strategy will honor the rule of law. We have a new generation of men and women who are drawn to the all-volunteer forces by a combination of pride, patriotism and the need for self-affirmation. They are at their best when they believe in themselves, their service and their nation. Our accession programs and ceremonies emphasize respect for law and principle. The oath of office for military officers includes a pledge to support and defend the Constitution of the United States—not a monarch, but rather a body of law. Our oldest warship in commission is named not after a president or a famous battle, but rather that same hallowed legal text. The core principles of the Navy, Marine Corps and Coast Guard all highlight the importance of honor, which for Marines expressly includes the obligation to respect human dignity. Those creeds also recognize the importance of courage, one version of which expressly includes "moral courage," describing it as the inner strength to do what is right and to adhere to a higher

standard of conduct.<sup>91</sup> The service members who take these oaths and are moved by these creeds represent our nation's finest, and they deserve to know more than merely how and where they will fight; they deserve to know *why* they fight—that is, the principles they are being asked to support and defend. The Navy lieutenant junior grade leading her boarding team onto a freighter in the Arabian Gulf to conduct a Proliferation Security Initiative boarding and the battalion landing team sergeant major ordering his Marines into the LCACs and CH-46s to execute a non-combatant evacuation operation should both be able to see their core values reflected in the maritime strategy that sent them on their missions.

### ***Conclusion***

The decision by the Naval War College to integrate faculty from the College's International Law Department and outside legal experts into the strategy development process wisely ensured that the core strategy development team had access to a thoughtful and informed assessment of the future global legal order. Legal participation in the process by no means assures that the law will play a role in the new strategy, but there's every reason to believe that it will.

Respect for the rule of law is a signal strength for those who practice it and a vexatious, corrosive and embarrassing source of friction for those who fail to do so. By clearly embracing a position that promises respect for the rule of law in the new maritime strategy, the Navy can seize the opportunity to enhance its legitimacy and its ability to attract coalition partners, instill pride in its members and position itself more effectively to shape the global order. The Coast Guard has shown the way forward with its new *Strategy for Maritime Safety, Security, and Stewardship*.<sup>92</sup> But let there be no mistake: "respect" for the rule of law entails more than a one-sided obligation for the United States to obey the relevant laws advocated by asymmetrists.<sup>93</sup> It also means that we will expect others to comply with the law, including those provisions that, in the words of John Paul Jones more than two centuries ago, "protect" the nation, its vessels and aircraft, and their navigational rights and freedoms.

With all the buildup it has been given, the new strategy must not fall short in providing a fresh and proactive approach to a demonstrably new threat environment that has shaken a lot of people's confidence in the US national security system. It should be a strategy of hope and action, rather than one born of despair and cynicism. Whether you are an idealist aspiring to establish a shining city on the hill that reveres the rule of law for its own sake, or a calculating utilitarian methodically calibrating means to ends, there is much to value in a more robust rule of law, forcefully advocated by the three maritime service chiefs. For the utilitarians, ask

the Marines and soldiers in Fallujah, Ramadi and Kandahar whether the threat environment was better or worse after images of the disgraceful and lawless acts at the Abu Ghraib prison flashed across the Internet and Al Jazeera. While you're at it, ask them how it affected their pride as American service members. We cannot always control the behavior of our members, but our service chiefs can be firm and unequivocal about the fundamental principles for which we stand.

It must seem to many that the world has not changed much since the interwar years that drove Yeats to lament the loss of conviction by the best, the rise of passionate intensity by the worst, and the collapse of the “centre.”<sup>94</sup> What he left unnamed is the source and nature of that center and how we might fortify it. For many in Yeats’ age, the ordering force to provide that center was to be found in the hopeful vision of a new League of Nations. Their modern counterparts look to the rule of law developed and implemented by forward-thinking States coming together in respected and competent international organizations.<sup>95</sup>

I will close with a report on the informal surveys I conduct each year at my law school. In the first week of classes back in Seattle I ask my students for their views on the “rule of law.” They have so far been unanimous in their approval of the principle, though some are skeptical of its empirical record. But when I then ask them to define the rule of law, their brows furrow and they grow silently pensive. We shouldn’t be too hard on them. Few law school casebooks attempt to describe the rule of law or postulate its force or trajectory. And you will not be too surprised to learn that the Department of Defense dictionary does not define it. We must work to remedy that oversight. The legal profession has a well-earned reputation for persuasive communication. And I believe, as did Alexis de Tocqueville,<sup>96</sup> that we in the legal profession have a special province and duty. If law is the logic and language of global cooperation, we are its most proficient expositors. As such, it is, I believe, incumbent upon us all to embrace the rule of law as our lodestar, as the “center” for this tumultuous new century.<sup>97</sup> In short, it is time for us to take up the baton from Professor O’Connell and advance it steadily forward toward that elusive finish line.

#### *Postscript on US Accession to the 1982 LOS Convention*

The legal experts widely agreed that the first challenge that must be met is to obtain the necessary Senate and presidential action for the United States to accede to the 1982 LOS Convention. Nothing less than an all-agency full-court press will be sufficient. If the three maritime services and their allied agencies fail to persuade the Senate to approve the LOS Convention during the One Hundred Tenth Congress, a maritime strategy that purports to affirm the importance of law to global security

will have no credibility. Words without consistent action will soon be ignored and forgotten.

The call for Senate action was renewed when, during his January 30, 2007 confirmation hearing before the Foreign Relations Committee to serve as Deputy Secretary of State, former Director of National Intelligence John D. Negroponte affirmed the administration's strong support for the Convention. One week later, the Department of Defense once again included the LOS Convention on its treaty priority list.<sup>98</sup> The next day, the President's National Security Advisor, Stephen Hadley, wrote to Senator Joseph Biden, the new Chairman of the Senate Foreign Relations Committee, citing the "historic bipartisan support for the Law of the Sea Convention" and requesting Senate action "as early as possible during the 110th Congress."<sup>99</sup> On May 15, 2007, President Bush formally announced that he was urging the Senate to give its advice and consent to accession to the Convention during the current session of the Congress.<sup>100</sup> On June 13, 2007, Deputy Secretary of State Negroponte and Deputy Secretary of Defense Gordon England joined in an op-ed supporting accession.<sup>101</sup> The Navy and Coast Guard have long worked to gain Senate approval for the Convention. A recommendation that the United States accede to the Convention was the first resolution to come out of the US Commission on Ocean Policy chaired by former CNO Admiral James Watkins. In testimony before the Congress on March 1, 2007, Secretary of the Navy Donald Winter, Chief of Naval Operations Admiral Mike Mullen and Commandant of the Marine Corps James Conway unequivocally affirmed the Navy Department's support for US accession.<sup>102</sup> Admiral Thad Allen, Commandant of the Coast Guard, similarly reaffirmed his service's support for accession on May 17, 2007.<sup>103</sup>

Thus, there is every reason to be optimistic about the fate of the 1982 LOS Convention within the Senate this time. Painfully, however, we have been this close once before. It seemed like success was at hand in 2004, when Senator Lugar provided the needed leadership on the Foreign Relations Committee to achieve a unanimous recommendation out of that Committee that the US Senate should provide its assent. Somehow, however, a small but vocal opposition was able to persuade the Senate leadership not to bring the treaty to a floor vote.<sup>104</sup> If the Senate cannot now be persuaded to approve the LOS Convention, other parties to the Convention will continue to shape developments in the Commission on Continental Shelf Limits, International Seabed Authority and International Tribunal for the Law of the Sea and, perhaps, add a gloss to the Convention's text through the recognized process of agreed-upon interpretations.<sup>105</sup>

**Notes**

1. There is apparently no statutory mandate for such a plan; however, 10 US Code sec. 5062(a) (2006) provides that

[t]he Navy shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea. It is responsible for the preparation of naval forces necessary for the effective prosecution of war except as otherwise assigned and, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Navy to meet the needs of war.

2. A timeline of the process is available at <http://www.nwc.navy.mil/cnws/marstrat/overview.aspx> (last visited Feb. 8, 2008). Efforts at the Naval War College were led by Robert Rubel, Dean of the Center for Naval Warfare Studies.

3. D.P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER (1976). Other works examining legal limits on naval operations include MARK W. JANIS, SEA POWER AND THE LAW OF THE SEA (1976) and THOMAS GIBSON BOWLES, SEA LAW AND SEA POWER (1910).

4. O'CONNELL, *supra* note 3, at 13.

5. O'Connell also notes that "there is no public servant with such means of involving his government in international complications as the naval officer." *Id.* at 179.

6. See, e.g., ALFRED THAYER MAHAN, THE INFLUENCE OF SEA POWER UPON HISTORY 1660–1783 (5th ed. 1894); PETER PADFIELD, MARITIME SUPREMACY AND THE OPENING OF THE WESTERN MIND: NAVAL CAMPAIGNS THAT SHAPED THE MODERN WORLD, 1588–1782 (1999); PETER PADFIELD, MARITIME POWER AND THE STRUGGLE FOR FREEDOM: NAVAL CAMPAIGNS THAT SHAPED THE MODERN WORLD, 1788–1851 (2003); MICHAEL A. PALMER, COMMAND AT SEA: NAVAL COMMAND AND CONTROL SINCE THE SIXTEENTH CENTURY (2005); NORMAN FRIEDMAN, SEAPOWER AS STRATEGY: NAVIES AND NATIONAL INTERESTS (2001); ARTHUR HERMAN, TO RULE THE WAVES: HOW THE BRITISH NAVY SHAPED THE MODERN WORLD (2005). Although Herman's account does document the Royal Navy's contributions to eradicating piracy and slavery, his focus there is best characterized as the influence of the use of sea power on law, not the other way around.

7. Admiral Mike Mullen, Remarks at the Current Strategy Forum, Naval War College, Newport, Rhode Island, June 14, 2006, available at [http://www.navy.mil/navydata/people/cno/Mullen/CNO\\_CSF140606.pdf](http://www.navy.mil/navydata/people/cno/Mullen/CNO_CSF140606.pdf). See also Brendan M. Greeley Jr., *The CNO Calls for a New Maritime Strategy*, US NAVAL INSTITUTE PROCEEDINGS, July 2006, at 6. But see Jan S. Breemer, *The End of Naval Strategy: Revolutionary Change and the Future of American Naval Power*, 22 STRATEGIC REVIEW, Spring 1994, at 40–53.

8. Commandant of the Marine Corps, Chief of Naval Operations & Commandant of the Coast Guard, A Cooperative Strategy for 21st Century Seapower (Oct. 2007), available at <http://www.navy.mil/maritime/MaritimeStrategy.pdf>.

9. Vern Clark, *Sea Power 21: Projecting Decisive Joint Capabilities*, US NAVAL INSTITUTE PROCEEDINGS, Oct. 2002, at 32 (describing the Sea Strike, Sea Shield and Sea Basing capabilities).

10. US Marine Corps, Marine Corps Strategy 21 (Nov. 3, 2000), available at [http://www.usmc.mil/template1.nsf/25241abbb036b230852569c4004eff0e/\\$FILE/strategy.pdf](http://www.usmc.mil/template1.nsf/25241abbb036b230852569c4004eff0e/$FILE/strategy.pdf).

11. Chief of Naval Operations, Navy Strategic Plan in support of Program Objective Memorandum 08 (May 2006), available at [http://www.jhuapl.edu/MaritimeRegistry/Documents/nsp\\_2006.pdf](http://www.jhuapl.edu/MaritimeRegistry/Documents/nsp_2006.pdf).

12. Chief of Naval Operations & Commandant of the Marine Corps, Naval Operations Concept 2006, *available at* <http://www.mcwl.quantico.usmc.mil/concepts/ServiceConcepts/NOC%20FINAL%2014%20Sep.pdf>.
13. Commandant of the Coast Guard, US Coast Guard Strategy for Maritime Safety, Security, and Stewardship (Jan. 19, 2007), *available at* <http://www.uscg.mil/comdt/speeches/docs/CGS-Final.pdf>.
14. The CNO and the Commandant of the Coast Guard have also joined in the *National Fleet Policy*. See Michael G. Mullen & Thomas H. Collins, National Fleet: A Joint Navy/Coast Guard Policy Statement (Mar. 3, 2006) (noting that the Coast Guard's contributions to the national fleet will include statutory authorities and law enforcement teams for full-spectrum operations, including maritime security and counterterrorism operations), *available at* [http://www.navy.mil/navydata/cno/2006\\_national\\_fleet\\_policy.pdf](http://www.navy.mil/navydata/cno/2006_national_fleet_policy.pdf). See also Thad Allen & Mike Mullen, *America's National Fleet: A Coast Guard-Navy Imperative*, US NAVAL INSTITUTE PROCEEDINGS, Aug. 2006, at 16–20.
15. Other institutions in the strategy development process included the US Naval Academy, Naval Postgraduate School, Center for Naval Analyses, US Army War College, National War College and the Applied Physics Laboratory at Johns Hopkins University.
16. The White House, National Security Strategy of the United States (Mar. 2006), *available at* <http://www.whitehouse.gov/nsc/nss.html> [hereinafter National Security Strategy]. See also JOHN F. LEHMAN JR., COMMAND OF THE SEAS 121 (Bluejacket ed. 2001) (1988) (listing as the first of his eight principles of maritime strategy that “maritime strategy is derived from and dependent on the overall national security strategy established by the president”).
17. Cf. 50 US Code sec. 404a (2006).
18. See Chairman of the Joint Chiefs of Staff, Joint Publication 3-13, Doctrine for Joint Operations, at I-4 to I-5 (2001).
19. They include, for example, *The Maritime Strategy* (1984), . . . *From the Sea* (1992) and *Forward . . . From the Sea* (1998). The classified version of *The Maritime Strategy* was issued in 1984. See *The Evolution of the U.S. Navy's Maritime Strategy, 1977–1986*, NEWPORT PAPERS, No. 19 (John B. Hattendorf ed., 2004). Then-CNO Admiral James Watkins published a summary of the strategy in PROCEEDINGS OF THE NAVAL INSTITUTE in 1986. See James D. Watkins, *The Maritime Strategy*, US NAVAL INSTITUTE PROCEEDINGS, Jan. 1986, at 1. The latter two strategies are reproduced in *U.S. Naval Strategy in the 1990s*, NEWPORT PAPERS, No. 27 (John B. Hattendorf ed., 2006).
20. Office of the Chief of Naval Operations & Headquarters United States Marine Corps, Naval Warfare (1994), *available at* [www.dtic.mil/doctrine/jel/service\\_pubs/ndp1.pdf](http://www.dtic.mil/doctrine/jel/service_pubs/ndp1.pdf). Reportedly, the publication is under revision.
21. United Nations Convention on the Law of the Sea art. 94, Dec. 10, 1982, 1833 U.N.T.S. 3, reprinted in 21 INTERNATIONAL LEGAL MATERIALS 1261 [hereinafter 1982 LOS Convention].
22. Department of Defense, Joint Publication 1-02, DoD Dictionary of Military and Associated Terms (2007), *available at* <http://www.dtic.mil/doctrine/jel/doddict/>.
23. See LEHMAN, *supra* note 16, at 131.
24. See NATIONAL INTELLIGENCE COUNCIL, MAPPING THE GLOBAL FUTURE: REPORT OF THE NATIONAL INTELLIGENCE COUNCIL'S 2020 PROJECT (2004), *available at* [http://www.dni.gov/nic/NIC\\_globaltrend2020.html](http://www.dni.gov/nic/NIC_globaltrend2020.html).
25. UK Ministry of Defence Development and Concepts Doctrine Centre, Strategic Trends 2007–2036 (3d ed. 2007), *available at* [http://www.mod.uk/NR/rdonlyres/5CB29DC4-9B4A-4DFD-B363-3282BE255CE7/0/strat\\_trends\\_23jan07.pdf](http://www.mod.uk/NR/rdonlyres/5CB29DC4-9B4A-4DFD-B363-3282BE255CE7/0/strat_trends_23jan07.pdf).

26. US Naval War College, Results of the Maritime Strategy Geo-strategic Environment Workshop 23–24 August 2006 available at [http://www.nwc.navy.mil/cnws/marstrat/docs/research/Aug\\_25\\_Geostrategic\\_Workshop\\_Final\\_Report.pdf](http://www.nwc.navy.mil/cnws/marstrat/docs/research/Aug_25_Geostrategic_Workshop_Final_Report.pdf).

27. See generally ROBERT D. KAPLAN, THE COMING ANARCHY: SHATTERING THE DREAMS OF THE POST COLD WAR (2000).

28. THOMAS P.M. BARNETT, THE PENTAGON'S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY 179, 313–15 (2004).

29. US Special Operation Command's "sovereign challenge" initiative is designed to help other States appreciate the effect of global terrorism on State sovereignty. Among other things, it has persuaded US Southern Command to avoid phrases such as "coalition partners" and "partner nations," and instead use "sovereign nations" to reinforce the importance of the State. See Sovereign Challenge: The Network for Sovereign Nation Collaboration toward a Global Anti-terrorist Environment, available at <http://www.sovereignchallenge.org> (unclassified, but restricted access).

30. FAREED ZAKARIA, THE FUTURE OF FREEDOM (2003).

31. See generally MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR 197–98, 204 (1991). See also RUPERT SMITH, THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD (2007); NIALL FERGUSON, THE WAR OF THE WORLD: TWENTIETH-CENTURY CONFLICT AND THE DESCENT OF THE WEST (2006).

32. Some would include environmental security as well. See generally THOMAS HOMER-DIXON, ENVIRONMENT, SCARCITY, AND VIOLENCE (1999).

33. 1982 LOS Convention, *supra* note 21, art. 94.

34. For two views on lawfare, see Charles Dunlap, *Legal Issues in Coalition Warfare: A US Perspective*, in THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE 221 (Anthony M. Helm ed., 2006) (Vol. 82, US Naval War College International Law Studies) and Davida E. Kellogg, *International Law and Terrorism*, MILITARY REVIEW, Sept./Oct. 2005, at 50.

35. Held Dec. 6–7, 2006.

36. A report of the proceedings and the papers of the Workshop are found in ECONOMICS AND MARITIME STRATEGY: IMPLICATIONS FOR THE 21ST CENTURY (Richmond M. Lloyd ed., 2006), available at <http://www.nwc.navy.mil/academics/courses/nsdm/rugerpapers.aspx>.

37. Craig H. Allen, *Legal Interoperability Issues in International Cooperation Measures to Secure the Maritime Commons*, in *id.* at 113.

38. As used herein, "international institutions" refers to a set of rules that stipulate the ways in which States should cooperate and compete with each other. They call for decentralized cooperation of individual sovereign States, without any effective mechanism of command. They are sometimes formalized into international agreements and embodied in international organizations with their own personnel and budgets. See John J. Mearsheimer, *The False Promise of International Institutions*, 19 INTERNATIONAL SECURITY, Winter 1994/95, at 5. The Proliferation Security Initiative is an example of an international institution that is not based on a formal agreement or organization. See US Department of State, Bureau of Public Affairs, Fact Sheet, Proliferation Security Initiative (Feb. 9, 2006), <http://www.state.gov/t/isn/60896.htm>. See also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law, International Criminal Law: "Proliferation Security Initiative" for Searching Potential WMD Vessels*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 355 (2004). By contrast, the International Atomic Energy Agency (IAEA) is an international organization that facilitates an international regime. For a description of the IAEA's mission, see IAEA.org, The "Atoms for Peace" Agency, <http://www.iaea.org/About/index.html> (last visited Feb. 8, 2008).

39. Realism is one of several positive theories of international relations that seek to (1) describe the world of international affairs, (2) predict how it might change in the coming years and (3) prescribe a response to that world. Such positive analysis must be distinguished from the normative approaches in political philosophy.

40. See Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INTERNATIONAL ORGANIZATIONS 185, 190 (1982).

41. *Id.* at 189. In reviewing Anthony Arend's book *Legal Rules and International Society*, David Bederman surveys views on international law held by the various schools of international relations:

But if [international relations (IR)] theory could not divine a categorical conclusion as to the ultimate nature of the international order, both realists and institutionalists could agree on some things. One of them was that international law was irrelevant. The classical realist position, championed by such epic figures as Hans Morgenthau and George Kennan, is that international law is "epiphenomenal" ([that is,] stupid). The classical realists' intellectual successors, the structural realists (or neorealists), are no less hostile to international law. Such writers as Kenneth Waltz, John Mearsheimer, and Joseph Grieco were emphatic in their dismissal of international legal rules as an independent force influencing the behavior of nations. All that matters, according to the realists (whether classical or structural), is power. In their view, legalities can never constrain power. And if this seems dreary in a Hobbesian way, the rational institutionalists of IR theory are really no better. As Professor Arend notes at the outset of his book, institutionalists were quick to "sell-out" international law in their rush to defend themselves against the onslaught of realist attack. Much of rational institutionalist scholarship does not mention international law by name, preferring, instead, to resort to a bewildering array of jargon for such phenomena as regimes, norms, and values. International law, in the minds of such writers as Robert Keohane, Stephen Krasner, and Oran Young, is just, well, too legal. And even though the rational institutionalists espouse the view that institutions and regimes reduce transaction costs, stabilize expectations, allow "repeat-playing" and cooperation in international affairs, and permit decentralized enforcement of norms, none of these virtues necessarily translates into the recognition of definitively legal rules. According to the institutionalists, international law might impact "low-politics"—that realm of policy that is not at the core of central state interests. For the rational institutionalists, where rules really matter, there really is no law. This is what makes the institutionalists rational, at least in the view of their archenemies, the realists.

See David J. Bederman, *Constructivism, Positivism, and Empiricism in International Law, Review of Anthony Clark Arend, Legal Rules and International Society* (1999), 89 GEORGETOWN LAW JOURNAL 469 (2001) (footnotes omitted). Others respond that whatever its status as positive law, mere epiphenomenal character, or its comparatively primitive state of development, there is no denying that international law exerts a normative force on State behavior.

42. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 208 (1832). Lord Austin is said to have once likened the effect of international law to that of a hedgerow: while not blocking one's path, it certainly redirects one's trajectory.

43. HERBERT LIONEL ADOLPHUS (H.L.A.) HART, THE CONCEPT OF LAW 209, 226 (1961). For a forceful argument that the rules, principles and institutions of international law are essentially complete, see Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 207–12 (Michael Byers ed., 2000).

44. The final report of the Naval War College Legal Experts' Workshop is available at [http://www.nwc.navy.mil/cnws/marstrat/docs/research/Legal\\_Experts\\_Final\\_Report.pdf](http://www.nwc.navy.mil/cnws/marstrat/docs/research/Legal_Experts_Final_Report.pdf) (last visited Feb. 8, 2008).

45. See, e.g., COLIN S. GRAY, THE SHERIFF: AMERICA'S DEFENSE OF THE NEW WORLD ORDER 3 (2004) (in referring to the NATO intervention in Kosovo, without UN Security Council authorization, he argues that “[b]ecause world politics comprises a distinctly immature political system, we have to be somewhat relaxed about some of the legal niceties”).

46. CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard & Peter Paret eds. and trans., 1976) (1832).

47. GEORGE F. KENNAN, AMERICAN DIPLOMACY, 1900–1950, at 95 (expanded ed., 1984) (1951).

48. The assumptions were generally drawn from several reports on the experts' list of recommended materials, which included the Center for Strategic and International Studies' multimedia presentation, *Seven Revolutions*, [http://7revs.csis.org/sevenrevs\\_content.html](http://7revs.csis.org/sevenrevs_content.html) (last visited Feb. 11, 2008); The Princeton Project on National Security, G. JOHN IKENBERRY & ANNE-MARIE SLAUGHTER, FORGING A WORLD OF LIBERTY UNDER LAW, U.S. NATIONAL SECURITY IN THE 21ST CENTURY (2006), available at <http://www.princeton.edu/~ppns/report.html>; and UN Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004), available at <http://www.un.org/secureworld>.

49. THOMAS FRIEDMAN, LEXUS AND THE OLIVE TREE 239 (2000).

50. Colin S. Gray, *Stability Operations in Strategic Perspective: A Skeptical View*, PARAMETERS, Summer 2006, at 4.

51. PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY 314–16 (2002); PETER SCHWARTZ, THE ART OF THE LONG VIEW: PLANNING FOR THE FUTURE IN AN UNCERTAIN WORLD (1991).

52. National Security Strategy, *supra* note 16, at 4–5.

53. The White House, National Security Presidential Directive 41/Homeland Security Presidential Directive 13, at 2 (Dec. 21, 2004). See generally Department of Homeland Security, National Security Presidential Directive 41/Homeland Security Presidential Directive 13, available at [http://www.dhs.gov/xprevprot/programs/editorial\\_0597.shtm](http://www.dhs.gov/xprevprot/programs/editorial_0597.shtm).

54. The White House, National Strategy for Maritime Security 7 (Sept. 2005), available at <http://www.whitehouse.gov/homeland/maritime-security.html>.

55. National interests include survival, defense of the homeland, economic well-being, favorable world order and promotion of values. States are more willing to place their trust in international law and organizations for the protection and promotion of the latter three interests, less likely to do so with defense of the homeland, and would almost never do so when the State's survival is at stake.

56. See *The Caroline* (exchange of diplomatic notes between Great Britain and the United States, 1842), 2 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 409, 412 (1906); Alabama Claims Arbitration (U.S. v. U.K.), 1 Int. Arb. 495, 656 (John Bassett Moore ed., 1872).

57. I avoid arguments based on altruism, noting Colin Gray's observation that "altruism has a thin record in strategic history and, we must assume, an unpromising future." THE SHERIFF, *supra* note 45, at 8. See also JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 211–15 (2005).

58. A useful starting point for a common goal is secure, accessible and environmentally sound seas. For a discussion of the "thousand-ship navy" concept, see Christopher P. Caval, *The Thousand-Ship Navy*, ARMED FORCES JOURNAL, Dec. 2006, at 26, available at <http://www.armedservicesjournal.com/2006/12/2336959>.

59. Smaller, regional navies often embrace Professor Till's concept of good order at sea. Some remark that there are no longer any wars to be won, only order to be secured. See GEOFFREY TILL, *SEAPOWER: A GUIDE FOR THE TWENTY-FIRST CENTURY* (2004). See also RICHARD HILL, *MARITIME STRATEGY FOR MEDIUM POWERS* (1986).

60. Abraham Maslow, *A Theory of Human Motivation*, 50 PSYCHOLOGICAL REVIEW 370 (1943), available at <http://psychclassics.yorku.ca/Maslow/motivation.htm>.

61. THE SHERIFF, *supra* note 45, at 3.

62. But we should not fall prey to what some call the "perfect" regime paradigm, by which we assume that the present regime is complete and perfect and that new threats, challenges and opportunities can all be addressed by merely reinterpreting the existing regime. See Harry P. Monaghan, *Our Perfect Constitution*, 56 NEW YORK UNIVERSITY LAW REVIEW 353 (1981). To do so stifles rulemaking, substituting judges and academics for legislators. We would do well to consider the merits of one critic who suggested that the UN Charter system is only clear in its application where no State does anything. Perhaps it is asking too much to expect clarity from resolutions vetted through fifteen members of the Security Council. But the lack of clarity gives rise to the temptation for clever interpretations of UN Security Council resolutions or of Article 51 of the Charter.

63. Thomas Hobbes, *THE LEVIATHAN* (1651), republished as *THE LEVIATHAN: WITH SELECTED VARIANTS FROM THE LATIN EDITION OF 1668 ch. 17, para. 2* (Edwin Curley ed., 1994).

64. Future US security strategies will almost surely say a good deal more than the past ones about the tension between State sovereignty and international law and organizations. Many see the relationship between the two as a zero-sum game: every gain in international law or in an international organization's power necessarily means there must be an offsetting loss of State sovereignty. See, e.g., JEREMY A. RABKIN, *LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2005). Others see synergistic possibilities. See, e.g., STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999). A bold maritime strategy might start this conversation now in the expectation that it will bear fruit in 2009 with the new administration, perhaps even leading the way.

65. The diplomatic-ideological-military-economic force formulation by Professors McDougal and Feliciano in 1961 was plainly focused on State actors. See MYRES S. McDODGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 28–33 (1961).

66. The Commander's Handbook includes "judicial" powers in its consideration of nonmilitary measures. US Navy, US Marine Corps & US Coast Guard, NWP 1-14M/MCWP 5-12.1/ COMDTPUB P5800.7A, The Commander's Handbook on the Law of Naval Operations para. 4.2.3 (2007).

67. The President's recent executive order on "national security professional development" is likely to stimulate and expand those efforts. See Exec. Order No. 13,434, 72 Fed. Reg. 28583 (May 17, 2007).

68. Will the US maritime security forces operate with local law enforcement authorities? If so, legal interoperability and Posse Comitatus Act/DoD Directive 5525.5 issues must be considered. Some thought the DoD and the US Navy might want to revisit their role in law enforcement operations outside the United States. See Mark E. Rosen, Center for Naval Analyses, USN-USCG Integration, CNA Rep. CIM D0015579.A4/1 Rev. (Feb. 2007). For example, should the present authority of "public vessels" (including US Navy vessels) to enforce laws against piracy (33 US Code sec. 381–82) be expanded to include enforcement of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201 and the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Oct. 14, 2005, IMO Doc. LEG/CONF.15/21,

available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/treaties/notinforce/2005/30.html?query=suppression%20of%20unlawful%20acts> (which now extends to additional acts of maritime terrorism and transport of WMD)? The author has been informed that the Navy rejected the idea.

69. Who could imagine that Russian President and former KGB officer Vladimir Putin, speaking to an international forum in Munich in 2007, could (in the minds of some) credibly denounce the United States for its “disdain for basic principles of international law” or argue that now “nobody can take safety behind the stone wall of international law”? See Charles Krauthammer, *The Putin Doctrine*, WASHINGTON POST, Feb. 16, 2007, at A23, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/15/AR2007021501282.html>; Thomas L. Friedman, *Putin Pushes Back*, NEW YORK TIMES, Feb. 14, 2007, at A27, available at [http://select.nytimes.com/2007/02/14/opinion/14friedman.html?\\_r=1&oref=sloginavailable](http://select.nytimes.com/2007/02/14/opinion/14friedman.html?_r=1&oref=sloginavailable).

70. As Admiral Mullen described the Global Fleet Station concept, “The idea is to forward deploy, *where invited*, . . . a fleet of shallow-draft ships and support vessels . . . in green and brown water.” Mullen, *supra* note 7 (emphasis added).

71. Twenty-five chiefs of navies from around the world offer their views on the 1,000-ship concept in *The Commanders Respond*, US NAVAL INSTITUTE PROCEEDINGS, Mar. 2006, at 34. Admiral Mullen has called the 1,000-ship navy “a network of international navies, coast guards, maritime forces, port operators, commercial shippers and local law enforcement, all working together.” Mike Mullen, Remarks at the Royal United Services Institute for Defence and Security Studies, Future Maritime Warfare Conference, London, England (Dec. 13, 2005), <http://www.navy.mil/navydata/cno/mullen/speeches/mullen051213.txt>. Compare this approach with JAMES CABLE, GUNBOAT DIPLOMACY: POLITICAL APPLICATIONS OF LIMITED NAVAL FORCE, 1919–1991 (1994) and KEN BOOTH, LAW, FORCE AND DIPLOMACY AT SEA (1985).

72. John G. Morgan Jr. & Charles W. Martoglio, *The 1,000-Ship Navy: Global Maritime Network*, US NAVAL INSTITUTE PROCEEDINGS, Nov. 2005, at 14.

73. *The Commanders Respond*, *supra* note 71, at 34.

74. *The Commanders Respond*, US NAVAL INSTITUTE PROCEEDINGS, Mar. 2007, at 14.

75. AUSTRALIAN MARITIME DOCTRINE – RAN DOCTRINE 1 – 2000 ch. 4 (D.J. Shackleton ed., 2000), available at <http://www.navy.gov.au/spc/amd/amdintro.html>.

76. *Supra* note 13, at 6.

77. The new Joint Publication on Multinational Operations recognizes that “[c]ommanders must ensure that MNTF forces comply with applicable national and international laws during the conduct of all military operations.” Chairman of the Joint Chiefs of Staff, Joint Publication 3-16, Multinational Operations, at III-6 (2007). Joint Publication 3-16 lists law not as an “operational” consideration in planning and execution, but rather as one of several “general considerations,” which include, *inter alia*, rules of engagement, language, culture and sovereignty.

78. In 2006, the United States lost its seat on the International Law Commission (ILC), arguably the world’s most important international law codification and progressive development forum, when its candidate was, for the first time since the ILC’s founding, not voted a seat on the Commission. Those who observed the international and non-governmental organization politics behind the United States being voted off the UN Human Rights Commission on May 3, 2001 should not have been surprised.

79. See Daniel Moran, *The International Law of the Sea in a Globalized World*, in GLOBALIZATION AND MARITIME POWER 221, 236–37 (Sam J. Tangredi ed., 2002). After noting Britain’s difficulties in eradicating slave trading by sea, the author argues that

in matters of international law, practice trumps theory. Or, more precisely, it precedes it, both logically and for the most part historically, as the developments surveyed in this

essay illustrate clearly enough. This deference of theory to practice is not a defect of international law. On the contrary, it is testimony to its underlying realism and utility. Yet it does suggest that international law is probably not the place to look for leadership in solving the problems of the emergent global economy or in addressing the strategic challenges that have followed in its wake.

80. For example, the 2006 Green Paper on Maritime Strategy for the European Union concludes that

[t]he legal system relating to oceans and seas based on UNCLOS needs to be developed to face new challenges. The UNCLOS regime for EEZ and international straits makes it harder for coastal states to exercise jurisdiction over transiting ships, despite the fact that any pollution incident in these zones presents an imminent risk for them. This makes it difficult to comply with the general obligations (themselves set up by UNCLOS) of coastal states, to protect their marine environment against pollution.

European Commission, Towards a Future Maritime Policy for the Union: A European Vision for the Oceans and Seas 41–42 (2006), available at [http://ec.europa.eu/maritimeaffairs/pdf/com\\_2006\\_0275\\_en\\_part2.pdf](http://ec.europa.eu/maritimeaffairs/pdf/com_2006_0275_en_part2.pdf). See also Justin Stares, *UN Right to Free Passage under Fire*, LLOYD'S LIST, June 5, 2007, available at <http://www.lloydslist.com/ll/news/articleSearch.htm>; then search “Justin Stares UN Right to Free Passage under Fire” (subscription required) (reporting on European Union discussions to extend coastal State jurisdiction in the exclusive economic zone to include the transport of illegal migrants).

81. See George V. Galdorisi & Alan G. Kaufman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict*, 32 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 253 (2002). When the law of the sea was largely a matter of customary law, Judge Jessup argued that States could assert jurisdiction beyond their territorial seas in self-defense or self-preservation. PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 96–101 (1927).

82. My use of the term “rule set” begs the important and controversial question “which rule set?” It is important to keep in mind that, as the Department of State’s Legal Advisor John Bellinger highlighted in his address to the 2006 Naval War College International Law Department Conference, a number of States and non-governmental organizations criticize the United States for its disregard for “international law” when often the “laws” they are referring to are not binding on the United States (e.g., the Rome Statute establishing the International Criminal Court, the Kyoto Protocol, the Ottawa Anti-personnel Landmines Convention and the Additional Protocols to the 1949 Geneva Conventions). The critics rhetorically conflate a policy choice by the United States not to become party to a treaty with violations of a treaty to which the United States is a party. This can present a problem for the strategy drafter who might need to choose his/her words carefully, to make it clear that the United States will adhere to international law to which it has consented to be bound. See John B. Bellinger III, *International Legal Public Diplomacy*, in GLOBAL LEGAL CHALLENGES: COMMAND OF THE COMMONS, STRATEGIC COMMUNICATIONS AND NATURAL DISASTERS 205 (Michael D. Carsten ed., 2007) (Vol. 83, US Naval War College International Law Studies). See also Policy Coordinating Committee, US National Strategy for Public Diplomacy and Strategic Communication (2007), available at <http://www.state.gov/documents/organization/87427.pdf>.

83. See, e.g., John Pompre, *China Ponders New Rules of Unrestricted Warfare*, WASHINGTON POST, Aug. 9, 1999, at 1, quoting Colonel Wang Xiangsui, of the Chinese Air Force: “War has rules, but those rules were made by the West. . . . [I]f you follow those rules, then weak countries have no chance. . . . We are a weak country, so do we need to fight according to your rules? No.”

84. The classical approach was the “fleet in being.” See Julian Corbett, SOME PRINCIPLES OF MARITIME STRATEGY pt. III, ch. III (1911).

85. See generally Craig H. Allen, *Command of the Commons Boasts: An Invitation to Lawfare?*, in GLOBAL LEGAL CHALLENGES, *supra* note 82, at 21. Examples might include the Rome Statute establishing the International Criminal Court, Additional Protocol I to the 1949 Geneva Conventions and the Convention on Anti-personnel Landmines. In the words of Vattel, in international law “strength or weakness . . . counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign state than the most powerful Kingdom.” EMERICH DE VATTTEL, *DROIT DES GENS* (1758), quoted in ADAM WATSON, THE EVOLUTION OF INTERNATIONAL SOCIETY 203 (1992).

86. Kellogg, *supra* note 34, at 50.

87. The “New Haven School” policy-oriented jurisprudence developed by Yale Professors Myres McDougal and Harold Lasswell depicts international law as a process, in which “uses” produce “effects,” some of which are undesired, resulting in “responses,” which may include new rules. MYRES S. MCDOUGAL & HAROLD D. LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992).

88. Some have argued that only the United States has an independent global security strategy. See, e.g., ROBERT COOPER, THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY 45 (2004); LEHMAN, *supra* note 16, at 135–36 (noting that any US maritime strategy must be global in concept).

89. John Paul Jones, quoted in BURDICK H. BRITTIN, INTERNATIONAL LAW FOR SEAGOING OFFICERS 7–8 (5th ed. 1986). The relevant law was collected, reported, analyzed and, in my opinion, shaped by the pioneer Charles H. Stockton in his early books on international law; by Captain Burdick Brittin in the five editions of his Naval Institute Press books published between 1956 and 1986; and by the 1987 Commander’s Handbook on the Law of Naval Operation and the later *Annotated Supplement*, which many believe sprang fully footnoted from the cranium of one Captain Jack Grunawalt (US Navy, retired). The current iteration of the Commander’s Handbook is cited in note 66.

90. See Department of the Navy, US Navy Regulations art. 0705 (1990). Arguably, the Army’s commitment to a robust operational law program, begun in the 1980s under the leadership of visionaries like Colonel David Graham, went one step further by putting the requirement to conform to the law into practice through training and wider use of the service’s judge advocates. Some now urge that operational law should be included in the Joint Professional Military Education requirements.

91. For the sake of argument, I will concede that protecting human rights abroad is not widely viewed as a “vital interest” of the United States; however, we must not overlook how entrenched this issue is in our national identity. Strategy must serve the national interests; but it must also be consistent with the national identity. See William C. Adams, *Opinion and Foreign Policy*, FOREIGN SERVICES JOURNAL (May 1984), available at <http://www.gwu.edu/~pad/202/readings/foreign.html>. For the United States, that identity begins with a reminder that we are the world’s oldest constitutional democracy.

92. *Supra* note 13.

93. See ROGER W. BARNETT, ASYMMETRICAL WARFARE: TODAY’S CHALLENGE TO U.S. MILITARY POWER ch 3. (2003) (discussing exploitation of legal constraints by asymmetric opponents).

94. William Butler Yeats, *The Second Coming* (1920).

95. PAUL KENNEDY, THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS (2006); ANNE-MARIE SLAUGHTER, THE NEW WORLD ORDER (2004).

Professor Kennedy opens his book with Alfred Lord Tennyson's 1837 poem *Locksley Hall*, which accurately reflects the modern/postmodern view.

96. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835).

97. The author is indebted to the late Judge William L. Dwyer (US District Court for the Western District of Washington) for the allusion to Yeats and the suggestion that the law can serve as our "centre."

98. Deputy Secretary of Defense, Memorandum for the Executive Secretary, National Security Council, Treaty Priority List (Feb. 7, 2007) (copy of letter and FOUO attachment on file with the author). *See also* Department of Defense, National Security and the Convention on the Law of the Sea (2d ed. 1996).

99. Letter of Stephen J. Hadley, Assistant to the President for National Security Affairs, to Senate Foreign Relations Committee Chairman Joseph Biden (Feb. 8, 2007) (copy on file with the author).

100. *See* The White House, President's Statement on Advancing U.S. Interests in the World's Oceans (May 15, 2007), available at <http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html>.

101. John D. Negroponte & Gordon England, *Reap the Bounty*, WASHINGTON TIMES, June 16, 2007, at 17.

102. *See, e.g.*, Testimony of Hon. Donald C. Winter, Secretary of the Navy; Admiral Michael G. Mullen, Chief of Naval Operations; and General James T. Conway, Commandant of the Marine Corps, to the House Armed Services Committee on the Fiscal Year 2008 National Defense Budget Request from the Department of the Navy (Mar. 1, 2007), [http://armedservices.house.gov/hearing\\_information.shtml](http://armedservices.house.gov/hearing_information.shtml).

103. Statement by Admiral Thad Allen, Commandant of the Coast Guard, on the Convention on the Law of the Sea (May 17, 2007), <https://www.piersystem.com/go/doc/786/156912/>.

104. *See* JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 240–45 (2004) (analyzing the arguments for and against US accession and the prospects for success); Congressional Research Service, The Law of the Sea Convention and U.S. Policy (updated Jan. 27, 2006), CRS No. IB95010.

105. *See* A.V. Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea*, in THE LAW OF NAVAL OPERATIONS 109, 111 (Horace B. Robertson Jr. ed., 1991) (Vol. 64, US Naval War College International Law Studies). In discussing evolution of the law governing maritime baselines, Professor Lowe was likely thinking of Article 31(3) of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.



# II

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## Conditions on Entry of Foreign-Flag Vessels into US Ports to Promote Maritime Security

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William D. Baumgartner and John T. Oliver\*

### *Executive Summary*

One of the most important engines driving global economic development and progress in recent years is the freedom to engage in seaborne trade throughout the world. Relatively unhindered access to the world's ports is a vitally important component of the recent story of global economic success. At the same time, the grave threats that international terrorists and rogue States pose to global order give rise to overriding maritime security concerns among port States, factors which argue strongly against a maritime open-door policy. Other vital concerns, including illegal immigration, drug trafficking, unsafe oil tankers, illegal fishing and other threats to the marine environment, and violation of customs and trade laws, are also prompting port States to take actions that impose conditions on port entry, to exercise greater jurisdiction in port and even to restrict traditional freedoms of navigation in coastal waters.

As a general rule, international law presumes that the ports of every State should be open to all commercial vessels. However, if a State considers that one or more important interests require closure, necessitate imposing conditions on entry or exit, or dictate the exercise of greater jurisdiction over foreign vessels in port,

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international law generally permits the port State to do so. A port State may restrict the port entry of all foreign vessels, subject only to any rights of entry clearly granted under an applicable treaty and those vessels in distress due to *force majeure*. At the same time, international law presumes that the port State will restrict access to foreign commercial vessels or impose sanctions upon those that enter port, even those designed to promote important maritime goals, which are reasonably related to ensuring the safe, secure and appropriate entry or departure of the vessel on the occasion in question.

As a fundamental policy goal, all States must cooperate to develop and implement efficient and effective conditions on port entry to ensure the security of the port State and the international commercial system. Unreasonably restrictive conditions would have a deleterious effect on global trade and the world's economy. Ineffective conditions on entry, such as faulty procedures to screen ships and their cargoes, could result in a security breakdown and a devastating terrorist attack on a port city. Such a disaster would render virtually inconsequential the debate over restrictions on port entry to achieve political, environmental, navigational safety, law enforcement or other worthwhile goals. Even so, international lawyers and policy-makers in the United States and elsewhere must seek to ensure that access to the ports of the world is fundamentally free, and restricted only on conditions directly, effectively and reasonably related to the significant interests of the port State and the world community at large.

This article discusses general principles of international and domestic law governing the condition of port entry as a basis for regulating foreign vessels entering ports, with an emphasis on maritime security. It also considers the policy consequences of imposing legally permissible restrictions or requirements that could have the practical effect of infringing unreasonably on maritime commerce, or which would lead to concerns in the international community and which might result in diplomatic protests and political objections. The goal of the article is to develop an analytical structure that would encourage a rational review of any proposed conditions on entry to ports to help ensure that any such requirements are legal, acceptable, reasonable and wise. In a post-9/11 world that remains dependent on international trade for economic prosperity, achieving an effective, balanced, legal and workable port-entry regime is a vitally important goal.

### ***I. Introduction and Competing Policy Interests***

As a general rule, international law presumes that the ports of every State should be open to all commercial vessels seeking to call on them. As Professors McDougal and Burke observed forty-five years ago: "The chief function of ports for the coastal

state is in provision of cheap and easy access to the oceans and to the rest of the world . . . [T]he availability of good harbors . . . remains a priceless national asset.”<sup>1</sup> Every modern State has a general obligation to engage in commercial intercourse with other States and, absent an important reason, none should deny foreign commercial vessels reciprocal access to its ports.<sup>2</sup>

In a much-quoted (yet often-criticized) statement, an arbitral tribunal observed in the *Aramco* case in 1958, “According to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require.”<sup>3</sup> In his widely respected treatise, Dr. C.J. Colombos wrote that “in time of peace, commercial ports must be left open to international traffic,” and that the “liberty of access to ports granted to foreign vessels implies their right to load and unload their cargoes; embark and disembark their passengers.”<sup>4</sup> The *Third Restatement of the Foreign Relations Law of the United States* summarizes the legal principle as follows: “In general, maritime ports are open to foreign ships on condition of reciprocity, . . . but the coastal State may temporarily suspend access in exceptional cases for imperative reasons . . .”<sup>5</sup>

At the same time, each port State has the sovereign right to deny entry and to establish reasonable conditions related to access to its internal waters, harbors, roadsteads and ports.<sup>6</sup> Indeed, apart from certain pronouncements, there is little actual support for the broad statement that ports can only be closed for “vital interests” or “imperative reasons” as a fundamental principle of customary international law.<sup>7</sup> The 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention)<sup>8</sup> “contains no restriction on the right of a state to establish port entry requirements . . .”<sup>9</sup> Article 25, entitled “Rights of protection of the coastal State,” provides: “In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State . . . has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.”<sup>10</sup> While the United States signed the “Part XI Agreement,” which incorporates almost all of the 1982 LOS Conventions in 1994, the United States Senate has not yet ratified or acceded to it. Even so, the United States has long considered the navigation-related principles contained in the 1982 LOS Convention to reflect customary international law, binding on all States.<sup>11</sup>

After carefully examining the relevant authorities cited in support of such a right-of-port-entry principle in the *Aramco* case, Professor A.V. Lowe concluded that international law does not so severely restrict the authority of a port State to close a port or impose conditions on entry.<sup>12</sup> He convincingly distinguished between a *right* of entry and a *presumption* of entry, concluding that “the ports of a State which are designated for international trade are, in the absence of express provisions to the contrary made by a port State, presumed to be open to the

merchant ships of all States . . . . [S]uch ports should not be closed to foreign merchant ships except when the peace, good order, or security of the coastal State necessitates closure.”<sup>13</sup> Another knowledgeable observer went even further: “There is a presumption that all ports used for international trade are open to all merchant vessels, but this is practice only, based upon convenience and commercial interest; it is *not* a legal obligation . . . . Pursuant to [their sovereignty over their internal waters], states have absolute control over access to their ports.”<sup>14</sup> The United States Supreme Court observed that the internal waters and territorial sea are “subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether.”<sup>15</sup> In another case, the Supreme Court concluded that Congress had “the power . . . to condition access to our ports by foreign-owned vessels upon submission to any liabilities it may consider good American policy to exact.”<sup>16</sup>

Whether States view port entry as an international obligation or one granted based on international comity and domestic self-interest, they typically do not undertake to deny entry to their ports without good cause. Before restricting entry to its ports, a State must have good policy reasons to do so. “Vital interests,” “imperative reasons” or what factors may “necessitat[e] closure” or constitute “good policy” include such obvious ones as national security or public health. However, acceptable State practice includes closing a port to enforce an embargo, to sanction hostile behavior by another State, to impose a political reprisal<sup>17</sup> or to promote other significant interests as the port State may determine to be appropriate and necessary.<sup>18</sup>

There is a good deal of foreign State practice supporting the imposition of a broad spectrum of conditions governing port entry and the exercise of jurisdiction in port.<sup>19</sup> Today, there is general agreement “that the coastal state has full authority over access to ports and is competent to exercise it, virtually at will, to exclude entry by foreign vessels.”<sup>20</sup> Among appropriate entry conditions are complying with pilotage requirements, obeying traffic separation schemes and paying customs duties. Port States have even greater rights to limit or control entry with respect to certain categories of vessels, such as warships, nuclear-powered vessels, fishing boats and recreational craft. Absent agreement between the States concerned, foreign warships have no general expectation of being permitted entry<sup>21</sup> and must request permission to make a port call in each case.<sup>22</sup> International law also permits port States to deny or condition entry as they see fit to foreign-flag fishing boats<sup>23</sup> and private recreational craft.<sup>24</sup> Some port States may consider that the domestic political costs of approving nuclear-powered or -armed vessels entry to their waters are too high,<sup>25</sup> while granting port entry to warships, fishing vessels and private recreational craft does not promote the overriding interests of the port State in international trade that foreign-flag commercial vessels directly serve.

Just as there is a presumption that a port State may not properly bar a foreign commercial vessel from entry into its ports absent adequate justification, the affected flag State and the international community would view with concern the imposition of unreasonable, arbitrary or discriminatory requirements for access.<sup>26</sup> “It is . . . possible that closures or conditions of entry which are patently unreasonable or discriminatory might be held to amount to an *abus de droit*, for which the coastal State might be internationally responsible even if there was no right of entry to the port.”<sup>27</sup> However, both conventional and customary international law permit a State to impose reasonable restrictions on port entry.<sup>28</sup> The possible conditions on entry run from those historically designed to ensure that vessel and crew are free from infectious diseases, and that customs duties have or will be paid, to provisions ensuring that promises to use the services of a pilot when entering or exiting port, and to moor or anchor as directed, are kept. These also include those security-related concerns so important in a post-9/11 world, such as submission of passenger and crew lists and cargo manifests, and a willingness to wait beyond the limits of the territorial sea until an inspection of the vessel with radiation monitoring equipment can be completed.<sup>29</sup>

Of course, under the fundamental international legal principle of *pacta sunt servanda*, nation-States must comply with international agreements to which they are party. Hundreds of bilateral friendship, commerce and navigation (FCN) treaties govern the circumstances under which those party to the agreements permit port entry to the other.<sup>30</sup> Such FCN treaties confirm the general presumption that ports will be open and unrestricted by unreasonable conditions. Whether these bilateral FCN or “most-favored-nation” treaties concerning commerce and navigation reflect customary international law or may have helped established a rule of customary law, there is a general expectancy that, when entered into, commercial vessels of either party will be able to trade with any foreign port, and will need to comply only with standard and necessary port entry conditions and expectations.<sup>31</sup> Here again, international practice is to exclude warships and fishing vessels from the general presumption of entry.<sup>32</sup> Whether at sea or in port, warships and other sovereign immune vessels are subject only to the enforcement jurisdiction of the flag State.<sup>33</sup> If a sovereign immune vessel engages in an activity in violation of the law of the port State, local authorities may direct that the vessel leave immediately and may seek damages through diplomatic channels resulting from the actions of foreign sovereign immune vessels.<sup>34</sup>

Although a port State has a right to condition entry to its ports based on a broad spectrum of concerns, any such restrictions entail costs. The costs include those directly involved in administering the conditions, from processing the paperwork to conducting any ship inspections that may be necessary. Such direct costs may be

fully or partially offset with appropriate port-entry, pilotage, mooring or anchorage fees. But the most significant burden entails the economic, political and other costs involved in slowing, complicating or otherwise interfering with the smooth and efficient flow of international trade. Whether a nation's port-entry scheme requires a merchant vessel to wait outside port until it receives clearance, embarks a pilot or agrees to submit to a search, or imposes such an extensive planning, inspection or reporting system on shipping companies or ship masters that it is no longer attractive to do business with a certain nation or port, any such conditions on port entry make international trade more time-consuming, difficult and costly. The 1965 Convention on Facilitation of International Maritime Traffic, modeled on earlier international efforts to improve international air traffic, emphasizes the importance of simplifying and reducing to a minimum the administrative burdens imposed on international shipping "to facilitate and expedite international maritime traffic . . ."<sup>35</sup> International legal principles also expect that port States will extend "equality of treatment" to prohibit discrimination in all rules governing port entry and conditions and procedures applied to foreign commercial vessels.<sup>36</sup>

Given the crucial importance of international trade in today's global economy, the cumulative impact of incremental costs, short delays or minor disruptions can have a profoundly adverse impact. In this regard, harmonizing and coordinating conditions on port entry throughout the world community, with similar expectations, requirements, forms and procedures, can achieve the desired goals without imposing as much of an administrative burden. Wisely balancing the benefits to be achieved from imposing conditions on port entry, such as intelligently devised security requirements, against the costs and burdens associated with each is essential. As one commentator observed, with respect to the broader efforts to protect the nation's security against potential terrorist attacks, "Ultimately, getting homeland security right is not about constructing barricades to fend off terrorists. It is, or should be, about identifying and taking the steps necessary to allow the United States to remain an open, prosperous, free, and globally engaged society."<sup>37</sup> Promoting relatively unrestricted oceangoing trade is essential to the continued economic vitality of the world. As Dr. James Carafano, senior fellow for National Security and Homeland Security at the Heritage Foundation, observed: "Global commerce is the single greatest engine in economic growth and it's the single most important thing that raises the standard of living for every human being on the planet."<sup>38</sup> The goal of policymakers and the attorneys and other subject-matter experts who advise them must be to find an appropriate balance that fosters effective and workable limitations on port entry directly related to promoting the important goals to be achieved, while avoiding unnecessarily burdensome restrictions and procedures that merely hamper free international navigation and trade.

## *II. Historical Background, Contemporary Context and Analytical Structure*

### **A. Historical Background**

Seaborne commerce has been a vitally important part of the world's economy ever since mankind began to engage in substantial trade with his neighbor. Portuguese, Chinese, Arabian, Indian, Italian, Dutch, Spanish and English ships competed with each other over the centuries to dominate key trade routes and control the supply of commodities and other valuable goods. Global maritime trade has been a vital component in stimulating international relationships and economic growth. Indeed, perhaps the most impressive structural development in the history of world growth and development has been oceangoing trade. Particularly for goods carried in quantity or bulk, water transportation has long been cheaper and more efficient and—until the advent of railways, modern highways and trucks, and airplanes—usually a good deal faster than the alternative transportation modalities.

At the same time, history has demonstrated the risks associated with maritime activities. Too often, the crews of seagoing vessels were engaged in activities less benign than mutually beneficial, arm's-length trading. Pirates and privateers wreaked havoc on ships engaged in peaceful trade. Coastal raiders, such as the Hittites in the twelfth century BC, and Vikings around the tenth century AD, ravaged shipping, ports and peoples. Vicious oceangoing criminals have preyed on those weaker than themselves along the coasts of Africa and Southeast Asia for thousands of years. Powerful maritime States engaged in the conquest of foreign lands and monopolization of vital shipping lanes and key trading ports and nations. From seaborne attacks against ports in the Mediterranean to the surprise attack on Pearl Harbor, States have sought to exploit coastal waters to wage aggressive warfare. History has demonstrated that the tremendous benefits of international ocean commerce must be balanced against the potential risks. Even so, while the history of international ocean trade no doubt has demonstrated the potential for adverse activities and consequences, including imperialism, colonization, conflict, piracy and maritime terrorism, seaborne commerce has long been a vital component in promoting global economic growth and improving living conditions worldwide.<sup>39</sup>

### **B. Contemporary Context**

Nothing in history rivals the scale on which the world community trades by sea today. Moreover, world trade has been growing at 6–10 percent each year.<sup>40</sup> Ocean commerce will no doubt become increasingly vital in years to come. Some 95 percent of the world's trade today is dependent on maritime commerce. If it were not for ocean transport of key commodities, such as oil and natural gas, cereal grains, such as wheat and rice, and construction materials, many of the world's peoples

would not have power for their transportation and electrical systems, food for their tables or homes for their families. Increasingly, international trade has focused on high-value items, such as automobiles, televisions, furniture and expensive entertainment systems. Specially constructed roll-on, roll-off vehicle carriers and container ships carrying thousands of interchangeable sealed containers transport cargoes worth hundreds of millions of dollars. Often, the value of the cargo far exceeds the value of the ship. The nations of Asia, in particular Japan, South Korea, Thailand, Singapore, India and, increasingly, China (via modern port facilities in Hong Kong and, increasingly, on the mainland), dominate high-value ocean trade.<sup>41</sup> These States use a good portion of the profits from this trade to purchase oil and natural gas from the energy-rich Middle East, Indonesian archipelago, and parts of western Africa. Supertankers transport huge amounts of oil and liquefied natural gas (LNG) tankers carry tremendous volumes of natural gas through restricted waters of southeastern Asia to the vibrant, but energy-dependent, economies of North and South America, Europe, and South and East Asia.

Despite the tremendous worldwide economic growth exemplified by China, India, Brazil and several other developing States, the American economy remains, by far, the largest and most dynamic in the world. It would be difficult to exaggerate the importance of the maritime transportation component to this nation's economy. When measured by volume, more than 95 percent of international trade that enters or leaves this country does so through the nation's ports and inland waterways.<sup>42</sup> In 2004, US ports handled almost twenty million multimodal shipping containers.<sup>43</sup> Container ships, which account for only eleven percent of the annual tonnage of waterborne overseas trade, account for two-thirds of the value of that trade. Several of the 326 or so seagoing ports in the United States, including Los Angeles/Long Beach, New York, Houston, San Francisco and Baltimore, are among the busiest in the world in one or more categories.<sup>44</sup> In excess of two billion tons of domestic and international commerce now are carried on the water, creating more than thirteen million jobs and contributing more than \$742 billion to the gross national product.<sup>45</sup> Multimodal freight transportation accounts for nearly 15 percent of services the United States trades internationally. Each year, some 7,500 vessels flying foreign flags make 51,000 calls in US ports.<sup>46</sup>

Energy is also a critical and growing import into the United States. Large American owned and/or operated tankers carry oil from Valdez, Alaska to terminals and refineries on the West Coast. But a much larger volume of oil is imported into ports on the Gulf Coast from Mexico, Venezuela, Nigeria and the Middle East.<sup>47</sup> Increasingly, huge liquefied natural gas tankers call on US terminals to meet the tremendous and increasing American appetite for natural gas.<sup>48</sup> Presently, there are only six LNG terminals in the United States, but there are plans under way to

build dozens more.<sup>49</sup> Because the volume of international trade is expected to double by 2020, and because the maritime transportation system is the nation's best means of accommodating that growth, experts expect that the importance of seaports in the US economy will continue to grow dramatically over the coming years.<sup>50</sup>

While trade has grown dramatically, the potential national security risks are also far greater and more complex today than they have ever been in the past. To illustrate, in December, 1941, the Empire of Japan assembled a fleet consisting of six aircraft carriers, thousands of men, hundreds of aircraft and scores of supporting vessels (including submarines and mini-subs) to attack the US Navy and Army infrastructure at Pearl Harbor, Hawaii. This surprise attack killed some 2,403 service members and sixty-eight civilians, seriously damaged or destroyed twelve warships and 188 aircraft, caused hundreds of millions of dollars in damages to infrastructure, and plunged the United States into the Second World War.<sup>51</sup> Nearly sixty years later, a mere fifteen Al-Qaeda terrorists hijacked four civilian airliners and caused the death of nearly three thousand innocent civilians and wreaked incalculable financial costs by intentionally crashing three of the aircraft into the World Trade Center towers and Pentagon. As a result, the United States is now engaged in a "global war on terrorism" (GWOT), with hundreds of thousands of casualties and hundreds of billions of dollars in costs.<sup>52</sup>

Even this level of death and destruction would pale compared to the potential numbers of casualties, and the hundreds of billions of dollars in potential destruction and disruption of global trade, were a nuclear device, "dirty bomb" or other weapon of mass destruction to explode in a major port city, such as Long Beach or Baltimore.<sup>53</sup> Experts fear that terrorists could hide such a device in one of the many thousands of ubiquitous shipping containers imported into the United States every day.<sup>54</sup> Other scenarios, such as the possibility that terrorists would hijack an LNG carrier and detonate the cargo in a populated or industrial area, could also result in devastating destruction.<sup>55</sup> Assuming a rational and effective connection between restrictions on port entry and efforts to prevent such a disaster, a port State could condition port entry on compliance with virtually any set of maritime security measures consistent with international law. Likewise, port States could exert jurisdiction over foreign-flag vessels voluntarily in port, other than sovereign immune vessels, to carry out virtually any rational and effective security measure.

On the other hand, policy experts would argue that handcuffing international trade with irrational, excessive and ineffective restrictions would be counterproductive—enormously disruptive, hugely expensive and fundamentally unwise.<sup>56</sup> Moreover, if the United States were to adopt a policy to conduct wide-ranging, intrusive security raids on board foreign-flag vessels voluntarily present in US ports, such heavy-handed tactics would likely prompt international censure and, to some

extent, discourage trade. For national concerns of somewhat lesser magnitude, such as to prevent customs violations or the importation of illegal drugs, the imposition of intrusive pre-entry requirements, while legal, should also be directly and reasonably related to the goals to be accomplished.

### C. Analytical Structure

In evaluating the legal principles governing the right of port States to impose conditions on port entry to promote maritime security, this article will consider various factors. It will analyze the nature of the underlying activity, beginning with the most long-standing ones that are directly related to the vessel's visit to the particular port, and proceeding through those which have only recently been considered as conditions for restricting port entry, such as requiring other flag States to cooperate in the global war on terrorism. The more traditional, commonly required and obvious the condition on port entry, the more likely it will meet standards of international law, and also the more likely it will be widely regarded as prudent and necessary.

After analyzing the question of jurisdiction and the various types of underlying activities, we will next consider the nature of the conditions to be imposed, from something as unobtrusive as requiring the vessel to notify port authorities of its arrival, to a requirement to provide a list of the names and nationalities of all passengers and crew members, to submitting to an offshore inspection, to outright denial of entry to the port. The conditions may extend beyond the immediate visit of the vessel to the port State and include activities of the vessel on other occasions, of other ships of that shipping company or even of other vessels of that flag State.

Finally, we will consider a list of relevant questions that a port State and the international community should ask with respect to any proposed condition regulating entry into a port to ensure that it is reasonable and necessary. The questions deal with a variety of factors, ranging from the importance of the goal the regulatory scheme is designed to achieve, to the geographical and temporal nexus between the vessel and the port State, to the effectiveness of the proposed regulation, to the impact of the regulation on freedom of navigation and existing treaty obligations. The goal of this article is to develop and consider objective criteria to evaluate the legality and wisdom of conditions on port entry.

## *III. Conditions on Entry Directly Related to the Vessel's Port Visit*

### A. Port Security

Historically, as well as presently, the most vital single concern that a port State has had with respect to one or more foreign vessels entering its ports and internal waters involves its own security. As the United States Supreme Court has expressed it,

“[I]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”<sup>57</sup> As the English, Irish and French lookouts and private citizens stared awestruck out to sea in the years around the turn of the first millennium, they did not wonder whether the dozen or so longboats manned by Viking warriors they observed rowing into their ports or up their rivers were coming to engage in peaceful and productive trade. Instead, they were convinced, based on dreadful experience, that these Vikings were hell-bent on raiding their port villages, pillaging their riches, and abusing and murdering the inhabitants. In short, the security of their homeland was in peril.

For what good it might do, a port or nation obviously has always had the right to prohibit the entry of any vessel determined to inflict death and destruction upon it. In like manner, the port State could mandate a requirement that the pirate ship or foreign-flag raider disarm itself before entering, or sign a promise that no member of the crew would engage in any violent or illegal activities while in port. The problem was that, when faced with marauding Chinese pirates, Phoenician raiders or Vikings, the denizens of the beleaguered coastal port usually did not have the resources to insist on anything of the sort. Instead, the security forces and inhabitants could only run deep into the forest, row or sail further up the river, or climb the nearest mountainside, hoping that the raiders would not find the treasure hidden in the well or overtake and murder them as they fled.

Of course, pirates and other maritime raiders no longer represent a direct threat to Los Angeles, Lisbon or Sydney. Nonetheless, in the wake of 9/11, national security concerns remain paramount throughout the world. Experts conclude that the greatest single security risk to America and its allies today is a surreptitious terrorist attack on, or by way of, port cities using nuclear weapons.<sup>58</sup> To prevent the massive number of innocent deaths, physical destruction and financial disruption that this would entail,<sup>59</sup> a port State may legally do almost anything reasonably necessary to protect against such a threat. This article will discuss in detail the various possibilities of how far a port State may go to ensure port security during times of war or to protect against actual or potential threats to national security, such as from possible terrorist attacks.<sup>60</sup> Before doing so, however, we will first analyze the traditional requirements for port entry properly demanded of *bona fide* commercial vessels to comply with domestic laws to ensure good order and to protect the legitimate interests of the port State.

## **B. Fiscal, Immigration, Sanitation and Customs Laws and Regulations**

Beyond seeking to ensure the security of the port State, the most long-standing, traditional requirements attendant to a commercial vessel entering a foreign port facility are those that pertain to compliance with port State laws involving fiscal,

immigration, sanitation and customs (FISC) matters. From the time that the city fathers of Venice imposed import taxes on the foreign merchants seeking entry to trade their spices or other exotic wares, or the authorities of Tokyo required foreign ships to comply with domestic laws related to sanitation, health and immigration, coastal States have exacted financial requirements and imposed requirements to ensure that their citizens benefited from seaborne trade, rather than suffered adverse consequences.

All States today agree with the basic principle that a port State may condition a foreign ship's entry to port upon compliance with laws and regulations governing "the conduct of the business of the port . . . provided that these measures comply with the principle of equality of treatment" among foreign-flag vessels.<sup>61</sup> In the United States, Congress has provided for a regulatory scheme related to each FISC-related requirement, including port clearance and entry procedures,<sup>62</sup> payment of tonnage and customs duties,<sup>63</sup> restrictions on immigration,<sup>64</sup> and sanitation and health regulations.<sup>65</sup> No one doubts the legal authority for, indeed the necessity of, denying entry of a foreign ship to a port if passengers or members of the crew on board carry a serious infectious disease, such as tuberculosis or the plague.<sup>66</sup> Likewise, a port State may take necessary and effective steps, such as requiring that a local public health official first visit the vessel to confirm that the crew and passengers are all free of infectious disease, before granting port entry.<sup>67</sup> International law grants to port States the right to take necessary and appropriate actions to prevent the entry into the port of stowaways, absconders, deserters or other illegal immigrants.<sup>68</sup> Among those is the right to inquire as to nationality, demand to see each passport or other identifying document and determine the status and intentions of crew members and passengers.

For many years, each port State established its own paperwork and procedural requirements for foreign vessels to complete and submit. As international trade became more universal and essential, the hundreds of different procedural requirements and forms became burdensome, particularly where the failure to complete a particular document in a particular way caused the responsible bureaucrat to deny or delay port entry, or to delay departure. In some ports, a customs official would "overlook" a missing document or "assist" a master in filling out the required forms properly in exchange for an under-the-table payment. Even where no bribes or other chicanery was involved, the cost, confusion and delay inherent in complying with varying local laws and completing a plethora of different documents were considerable.

To help ameliorate the problem of burdensome forms and differing port-entry requirements, the 1965 London Convention on the Facilitation of International Maritime Traffic (FAL) established standard practices with respect to documents

and procedures that a port State may require a foreign vessel to submit prior to or upon port entrance.<sup>69</sup> Because it makes so much practical sense, the international community has embraced the Convention.<sup>70</sup> In implementing the FAL Convention to promote maritime efficiency, the International Maritime Organization (IMO) has developed recommended practices and prepared several standardized documents for port States to use.<sup>71</sup> Near universal agreement with what a port State could impose with respect to fiscal, immigration, sanitation and customs requirements, and standard forms and procedures, has greatly improved compliance and promoted international trade. While a port State not party to the FAL Convention could legally deviate from the IMO FISC-related standards as a condition for port entry, to do so would be self-defeating. No State wants to discourage international seaborne trade or, without good reason, increase the costs and delays associated with it. As a result, virtually all port States, whether or not party to the FAL Convention, use the standardized forms and follow the prescribed procedures.

### **C. Navigation, Pilotage and Mooring and Anchorage Requirements**

Port States have also traditionally imposed on visiting vessels the obligation to comply with requirements designed to ensure safe navigation within their internal waters and the operational efficiency of their ports. As Professors Myres McDougal and William Burke observed:<sup>72</sup>

Once vessels enter internal waters and are within state territory, states claim sole competence to prescribe for activities relating to the use of the waters. In the port, for example, coastal states claim authority to regulate the myriad activities connected with port operation such as the movement and anchorage of vessels . . . , assignments of berths, and numerous other events directly affecting the use of the area.

Applicable requirements range from rules mandating use of a pilot—often depending on the size of the vessel, its cargo, horsepower of its plant, and conditions of weather or tide—to manning and equipment expectations, to requirements as to where the vessel must anchor or moor. To have access to ports, all merchant vessels must follow the rules.

As a foreign vessel, particularly any large and unwieldy vessel, approaches the busy and restricted internal waters of a port, authorities of the port State usually require that a pilot boat meet it several miles from restricted waters. From the pilot boat emerges an expert mariner, with an intimate knowledge and familiarity about the waters, currents, shoals, winds and other peculiarities of the port, and who is comfortable in handling a wide range of merchant vessels in any kind of weather, tide, traffic, current and light conditions. The United States is one of many port

States that condition a foreign vessel's right of entry to its ports upon compliance with non-discriminatory pilotage laws and regulations.<sup>73</sup> In a federal law that traces its origins to 1789, pilots and the laws concerning the use of pilots to enter US ports are generally governed by applicable state laws, rather than any federally mandated requirements.<sup>74</sup> The purpose of pilotage laws is to better ensure that a vessel can enter and operate within a port safely. The practice of requiring pilots in the world's major ports and restricted waterways to ensure the safe entry and departure of larger commercial vessels is increasingly common worldwide. For example, among other requirements, the People's Republic of China now requires the use of licensed pilots for all foreign commercial vessels calling on any of its ports.<sup>75</sup>

Proper port management also requires that port State authorities designate when, where, how and under what circumstances a vessel can navigate in inland ports and waterways.<sup>76</sup> Anyone who has passed through the Panama Canal can attest to the scores of merchant ships "waiting their turn" anchored at either the Atlantic or Pacific side until such time as the local authorities and a qualified pilot are ready to take them.<sup>77</sup> Managing vessel traffic in the busy, fifty-six-mile-long Houston Ship Channel is nearly as hectic.<sup>78</sup> Without some degree of coordination and control over vessel operations, the complicated ballet of ships navigating the channel, anchoring or mooring at the appropriate places, and on-loading and off-loading cargoes could not be done safely or efficiently. An obvious permissible condition on port entry is a vessel's willingness to use (and pay for) a qualified pilot and to follow the rules of the port and directions from the harbor master and other authorities as to when, where and how to proceed. Failure to comply with these requirements means that the vessel would not be permitted to enter port or, once there, would be subject to enforcement jurisdiction.

### **D. Ability of the Vessel to Operate Safely**

Another significant goal of the port State is to ensure, as a condition of entry, that vessels entering a port will be able to navigate and operate safely.<sup>79</sup> Unsafe vessels and poorly trained crews present a major threat to the proper operation of a port facility and the coastal waters nearby. Those include vessels that are unseaworthy because they were not designed or constructed correctly or do not have proper equipment; are inadequately maintained; or have an improperly trained, manned or certified crew. The Transportation Safety Act includes special precautions that a port State may impose with respect to vessels carrying particularly hazardous materials, such as a cargo of explosives, radioactive materials or liquefied natural gas.<sup>80</sup> Unless the port authorities are convinced that a vessel transporting oil or other hazardous materials has the ability to enter port, conduct business there and depart the area safely, they are under no obligation to grant access to their internal waters

or ports.<sup>81</sup> Moreover, a port State has a right to insist, as a condition of entry, that the vessel and its crew have demonstrated that they are capable of operating safely and have no track record of maritime accidents.<sup>82</sup> The 1982 LOS Convention imposes a “duty to detain” on port States which have determined that a foreign-flag vessel within one of their ports is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment.<sup>83</sup> Finally, a port State may require, as a condition of entry, that the vessel is equipped with the latest IMO-approved safety technology to avoid collisions and groundings.<sup>84</sup>

International commerce would come to a virtual halt if the authorities in each port took it upon themselves to impose unique requirements as to how a ship should be constructed, equipped, manned, trained and operated. As a result, the international community has established detailed rules for most aspects of the construction, equipping, operations, manning and training of merchant vessels above a certain size. Of all the conventions dealing with maritime safety, the most important is the 1974 International Convention for the Safety of Life at Sea (SOLAS), as amended.<sup>85</sup> The original version was adopted in 1914 in response to the sinking of the luxury passenger liner *RMS Titanic*, and the resulting loss of more than fifteen hundred lives.<sup>86</sup> The latest version of SOLAS was adopted in 1974 and has been amended periodically since then. Under SOLAS, classification societies carefully survey (inspect) vessels during and immediately after construction to ensure compliance with international standards for strength, stability, damage control, safety and equipment. Defects must be corrected prior to satisfactorily completing the survey. Only then does the classification society issue a certificate documenting the conditions under which the vessel may safely operate. Although flag States have the primary responsibility to ensure ships flying their flag are properly documented, port States party to the SOLAS Convention have a duty to “intervene” to prevent a vessel from sailing until the owners and crew correct any unsafe conditions.<sup>87</sup>

Another multilateral treaty, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW Convention),<sup>88</sup> seeks to ensure that the vessel’s crew members, particularly the master and the vessel’s other officers, complete rigorous training on engineering, watch standing, ship handling, maintenance, rules of the nautical road, firefighting and damage control, and other emergency procedures. Only after he or she satisfactorily completes all aspects of training and demonstrates adequate experience and confidence under instruction is a crew member certified as qualified to serve. A major revision of the STCW Convention that the IMO completed in 1995 provides an even greater level of precision and standardization. The 1995 Amendments also

enhanced port State control, providing a specific right of intervention and detention in the case of a collision, grounding or other casualty, or evidence of erratic ship handling.<sup>89</sup>

These STCW requirements provide qualification standards and expectations for seafarers. Ideally, a French master in charge of a supertanker sailing from the Persian Gulf to Europe and back will have the same high level of qualifications as a South Korean master on a massive container ship sailing to and from Singapore and Southern California. Each should be able to safely navigate any vessel in his charge through any weather or casualty that might arise. The STCW Convention covers many other matters related to maritime safety, including mandatory crew rest and periodic recertification. Under US law, no vessel may enter or operate in the navigable waters of the United States unless such vessel complies with all applicable laws and regulations designed to promote maritime safety.<sup>90</sup>

From the perspective of the port State, the local authorities have the right to inquire whether the vessel's SOLAS certification and documentation are in order, and if all the crew have their required and up-to-date STCW certificates, prior to allowing the vessel to enter port.<sup>91</sup> Ensuring that a port visit will be completed safely is an essential port State function, and any requirement reasonably related to this goal is permissible as a condition on port entry.<sup>92</sup> If port State authorities consider it to be essential or helpful to accomplish this purpose, they may direct that the visiting vessel submit to a boarding to verify the accuracy of the information provided and, in cases of doubt, to physically check the seaworthiness of the vessel and qualifications of its crew. Where a pilot is required to be on board, he or she may not proceed into port unless the appropriate authorities are confident that the vessel is shipshape in every respect.

The United States Congress recently imposed a safety-related requirement, which the Coast Guard has begun to implement, that virtually all commercial vessels operating in US navigable waters carry a properly functioning Automatic Identification System (AIS).<sup>93</sup> "AIS-equipped vessels will transmit and receive navigation information such as vessel identification, position, dimensions, type, course, speed, navigational status, draft, cargo type, and destination in near real time."<sup>94</sup> AIS can prove essential to avoid collisions and groundings, monitor vessel traffic flow, and, as discussed below, help identify and track vessels of interest for security purposes as part of Maritime Domain Awareness (MDA).<sup>95</sup> "Once a potential threat has been identified, a port or coastal State must have the capability to detect, intercept and interdict it using patrol boats or maritime patrol aircraft. Such action could disrupt planned criminal acts and prevent the eventuality of a catastrophe before it threatens the port."<sup>96</sup> Other safety-related technology that the United States requires of most commercial and certain other vessels calling on US

ports includes IMO-approved electronic position-fixing devices,<sup>97</sup> automatic radar plotting aids<sup>98</sup> and emergency communications systems.<sup>99</sup>

#### **E. Voyage Information**

Another area of inquiry that port States usually make of vessels calling on their ports is that relating to voyage information. One common condition of port entry is providing a vessel's Notice of Arrival (NOA), including advance information as to the date and time it expects to reach port. Under current US Coast Guard regulations, modified following 9/11, visiting ships must generally provide NOA information ninety-six hours prior to arrival.<sup>100</sup> The information required in an NOA is extensive, including the name of the vessel, flag State, registered owner, operator, charterer and classification society.<sup>101</sup> Other voyage information required is the names of the last five ports or places visited, dates of arrival and departure, ports and places in the United States to be visited, the current location of the vessel, telephone contact information, detailed information on the crew and others on board, operational condition of the essential equipment, cargo declaration and the additional information required under the International Ship and Port Facility Code (ISPS Code).<sup>102</sup>

The vessel must make an additional notice whenever there is a hazardous condition, either on board the vessel or caused by the vessel.<sup>103</sup> Failure to do so means that the vessel will be denied entry and will have to wait outside of the port until the Coast Guard and other port authorities are satisfied that they can safely clear the ship.<sup>104</sup> Many of the NOA requirements are related to port security concerns. The ninety-six-hour reporting requirement permits Coast Guard and other authorities time to run the vessel through the appropriate automated databases to try to identify terrorist threats, suspected involvement in drug trafficking or trafficking in illegal immigrants, suspicious or hazardous cargo, and any other special vulnerabilities. By identifying the current flag State, port State authorities can determine whether the flag State is party to international procedures to reduce the risk of a terrorist attack, whether the vessel in question has been prescreened at its previous port of call and whether there is an applicable agreement permitting at-sea searches. The NOA regime also provides adequate time to arrange for pilotage and tug escorts and plan for the optimal use of limited port resources. International law clearly permits port States to require foreign merchant vessels to provide such information directly related to the voyage as a condition of entry, particularly where the IMO has made such requirements mandatory for all vessels.<sup>105</sup>

**IV. Conditions on Entry Related to National Defense, Homeland Security, Counterterrorism and Law Enforcement Concerns**

**A. Vessels from Enemy, Hostile, Unfriendly or Rogue States**

A port State has an absolute right to deny entry to its ports to foreign warships and certain other categories of ships it considers threatening.<sup>106</sup> Although their sovereign status gives warships special immunities from enforcement jurisdiction, a port State is within its rights to require prior authorization, deny entry for any cause or no cause at all, or condition access, such as limiting the number of warships that may be in port at any one time, or requiring that the vessel enter and leave port only during daylight hours.<sup>107</sup> Even where there is an FCN treaty granting to each party reciprocal rights to enter each other's ports, the provisions usually exclude routine entry rights for "vessels of war."<sup>108</sup> Article 13 of the Statute on the International Régime of Maritime Ports specifically excludes its application to warships.<sup>109</sup> The recognition that international law gives to port State discretion with respect to providing entry to warships is due to the special sovereign immune character of warships, the potential threat that they might represent to the security of the port State and the lack of reciprocal benefits that accrue to the port State when a merchant vessel engages in trade.<sup>110</sup> As a general rule, therefore, warships must make special arrangements and obtain prior permission before entering a foreign port.<sup>111</sup>

The power to deny entry to enemy or potentially hostile vessels is an obvious security precaution that States have followed for centuries. However, warships are not the only vessels to which a port State may deny entry for security reasons. In October 2006, the Japanese government barred all ships from North Korea, including commercial vessels and scheduled passenger ferries, from entering any of its ports due to the "gravest danger" represented by the underground nuclear-weapons test in that rogue State.<sup>112</sup> Australia followed suit, banning all North Korean ships from entering its ports except in dire emergencies.<sup>113</sup> The United States has taken even broader action against rogue States. In its most recent Maritime Operational Threat Response Plan, which is published as part of the National Strategy for Maritime Security, the US government listed six States as non-entrant countries. The six presently on the list are Cuba, Iran, Libya, North Korea, Sudan and Syria.<sup>114</sup> The Secretary of Homeland Security is charged with denying entry to all such vessels "to the internal waters and ports of the United States and, when appropriate, to the territorial seas of the United States."<sup>115</sup>

The right to deny port entry in times of actual or perceived threats to national security is well established in international law. In the early 1900s, Venezuela closed its ports to the vessels of a single US shipping company during a period of revolutionary activity in that nation. The steamship company filed suit before an

international arbitral tribunal complaining that the denial of access to Venezuelan ports was arbitrary and discriminatory, particularly since those same ports remained open to vessels from other companies.<sup>116</sup> Venezuela claimed that it had denied port entry to that company's vessels to prevent rebel forces from receiving support and supplies, and that the steamship company in question was the only one friendly to the rebels. The umpire found that the prohibition was permissible, opining that "the right to open and close, as a sovereign on its own territory, certain harbors, ports or rivers in order to prevent the trespassing of fiscal laws is not and could not be denied to the Venezuelan Government, much less this right can be denied when used . . . in defense of the existence of the Government."<sup>117</sup>

At the same time, US government officials may not act arbitrarily in denying port entry, even when based on security concerns. In 1950, President Truman, acting under the authority of the Magnuson Act, 50 US Code sec. 191, issued Executive Order 10,173, granting to cognizant officials of the US Coast Guard the authority to deny entry to US ports of foreign-flag vessels, or direct their anchorage and movement in US waters, as may be "necessary . . . to prevent damage or injury to any vessel or waterfront facility or waters of the United States . . ."<sup>118</sup> In *Canadian Transport Co. v. United States*, a Canadian corporation brought action against the United States for damages for the Coast Guard's refusal to permit a merchant vessel having a Polish master and officers entry to harbor in Norfolk, Virginia, on the basis that the presence of Communist bloc officers in that sensitive port might pose a risk to national security.<sup>119</sup> The District Court had entered summary judgment against plaintiff for failure to state a claim.<sup>120</sup> On appeal, however, the D.C. Circuit held that "if the Coast Guard officers acted arbitrarily and in violation of regulations in diverting [the foreign merchant vessel], the United States is not immune from a damage action . . ."<sup>121</sup> The Court returned the case to the District Court for a factual hearing on that single issue.

## **B. Denial of or Restrictions on Entry Related to Terrorism Concerns**

In recent years, international terrorism has replaced the Cold War and revolutionary zeal as the focus of greatest global security concern. Three trends—economic globalization, diffusion of nuclear weapons technology and well-funded and fanatical terrorism—present an unprecedented security threat to the United States, its trading partners and the whole world.<sup>122</sup> Given these trends, port States must do all they can to keep foreign merchant ships out of their coastal waters if they represent any kind of security risk; the stakes are simply too high.<sup>123</sup> According to Dr. Stephen Flynn, the current Jeane J. Kirkpatrick Senior Fellow in National Security Studies at the Council on Foreign Relations and an expert on the risk terrorists pose to international trade, the essence of the terrorist strategy is global economic

havoc: “There is a public safety imperative and a powerful economic case for advancing international trade security.”<sup>124</sup> Terrorism experts, and the terrorist organizations themselves, consider seaports to be particularly susceptible to attack.<sup>125</sup>

Moreover, the proliferation of nuclear weapons and other weapons of mass destruction, and the means to deliver them, dramatically increase the threat. Osama bin Laden is reported to have described the acquisition of nuclear weapons by Al-Qaeda as a “religious duty.”<sup>126</sup> An improvised nuclear weapon or “dirty bomb” hidden in a shipping container, secreted into a port city and then detonated there or after it has been loaded on a train or truck and in the transportation network could cause hundreds of thousands of deaths, hundreds of billions of dollars in destruction and incalculable damage to the world’s confidence in the global trading system. To prevent a terrorist attack by means of a weapon of mass destruction is a top priority, within both the United States and the international community.<sup>127</sup> Moreover, traditional containment and deterrence strategies that worked during the Cold War are no longer likely to succeed against fanatical terrorist groups.<sup>128</sup> Appropriate measures to reduce the risk of such an attack include any conditions on port entry, or outright denial of such entry, designed to detect and deter terrorists; nuclear weapons and other instrumentalities of mass destruction; and other weapons, supplies and materials used by terrorists from entering a port State.

While an attack with a nuclear weapon secreted on a container ship or otherwise introduced into the transportation system poses the gravest danger to a port State, a terrorist group could cause catastrophic damage using weapons widely available to it, such as conventional explosives and rockets. Before 9/11, for example, few would have guessed that a small group of committed, suicidal terrorists could have caused so much death and destruction by commandeering civilian jetliners and crashing them into the World Trade Center and Pentagon.<sup>129</sup> Various terrorist cells are no doubt speculating even now on vulnerabilities in existing port security plans and developing strategems to try to exploit them.

A port State has the right to deny entry or impose conditions on entry to its ports when it determines such action to be necessary to protect the port or coastal State and the security of the population against terrorist or other attacks. Indeed, under the “vital interests” analysis discussed above, this fundamental principle is self-evident. Nothing could be more “vital” than defending the homeland against a massive terrorist attack. Following the terrorist attacks on 9/11, the US Congress appropriated funds and passed laws, the Department of Homeland Security and other cognizant agencies implemented new policies and procedures, and airport, border, coastal, and port security has been strengthened considerably. Even so, experts agree that much more work needs to be done to make our nation’s ports and borders truly secure and prepared.<sup>130</sup>

There is an additional international legal basis for taking action against potential terrorist attacks—the fundamental right of self-defense. Article 51 of the United Nations Charter provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . .” While the United Nations originally visualized this provision as applying to defending against armed attacks initiated by other nation-States, such as Nazi Germany’s attack on Poland on September 1, 1939 or the invasion of South Korea by Communist North Korea in June, 1950, it seems perfectly appropriate to extend the right of self-defense to deter attacks by subnational terrorist groups, such as Al-Qaeda, in the GWOT. In the United States today, the emphasis has changed from enforcing the law and responding to attacks, to anticipating and preventing such attacks.<sup>131</sup> International law limits what a nation-State may do to protect itself against an armed attack by shooting first<sup>132</sup> or taking preemptive military measures beyond its own territory.<sup>133</sup> However, that paradigm may be changing with respect to preemptive action in anticipation of a terrorist attack. As the White House has argued:

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists . . . rely on acts of terror and, potentially, the use of weapons of mass destruction . . . . To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>134</sup>

In order to better protect the homeland against a terrorist attack, individual States and the international community must have adequate means to identify and track weapons, vessels, cargo, passengers and crew, and to take appropriate action against those that represent a threat. Some of the new programs designed to improve coastal and port security against potential terrorist attacks include the (1) Proliferation Security Initiative (PSI), (2) Container Security Initiative (CSI), (3) Automated Identification System (AIS), (4) Long-Range Identification and Tracking (LRIT) of Ships, (5) International Port Security Program, and (6) other initiatives to identify personnel and vessels that pose a security threat to the United States and its trading partners and to devise and improve processes to detect and deter them.<sup>135</sup>

One key reason for advancing the requirement of foreign vessels to provide a Notice of Arrival at least ninety-six hours before they plan to enter a US port is to ensure adequate time to check the accuracy and veracity of the details the vessel has provided.<sup>136</sup> In the United States, watch standers at the National Vessel Movement Center (NVMC) monitor the data and evaluate and promulgate possible threats.<sup>137</sup> However, the decision to approve or disapprove port entry is left to the discretion

of the Coast Guard Captain of the Port (COTP).<sup>138</sup> Implementing and improving processes to identify and track vessels and their cargoes, and to ensure the reliability of their crews, will continue to be a key factor in ensuring the security of the global transportation network in the United States and around the world.<sup>139</sup> This article will now briefly consider several of these initiatives and programs.

### *(1) Proliferation Security Initiative*

For many years, the United States and its allies were justifiably concerned about the prospect of certain categories of weapons and delivery systems falling into the hands of terrorists and rogue States. Various initiatives, including the Nuclear Non-Proliferation Treaty, specifically addressed the concern of proliferation of nuclear weapons and their delivery systems. The concern that outlaw States or international terrorists could get their hands on weapons of mass destruction intensified following the 9/11 terrorist attacks on the World Trade Center and the Pentagon. President Bush announced the PSI on May 31, 2003, as a “new effort to fight proliferation” through international agreements “to search . . . ships carrying suspect cargo to seize illegal weapons or missile technologies.”<sup>140</sup> The PSI was designed to help fill in the gap in international law to ban the secretive and dangerous trade in nuclear weapons, ballistic missiles, other weapons of mass destruction and their delivery systems, and component materials.<sup>141</sup>

The impetus to develop the PSI concept was largely due to the circumstances surrounding the interdiction of the North Korean freighter *So San* some six hundred miles off the Yemeni coast, which demonstrated the lack of international legal tools then available.<sup>142</sup> American satellites and Navy ships had tracked the *So San* following its departure from North Korea in mid-November 2002. Since the vessel was not flying a flag and there was intelligence information available that it was carrying ballistic missile components to Aden, Spanish naval vessels, in coordination with the United States, stopped and boarded the *So San* on the high seas.<sup>143</sup> The crew of the *So San* contended that the vessel was carrying a legal cargo of concrete to Yemen and showed papers demonstrating that it was validly registered in North Korea. Nonetheless, the search proceeded and uncovered Scud ballistic missile components and chemicals necessary to fuel the missiles hidden beneath the concrete. After Yemen demonstrated that the cargo was perfectly legal under a standard sales and shipping contract, Spanish and American authorities eventually had to acquiesce in the vessel continuing on to its destination.<sup>144</sup>

There was a general consensus within the Bush Administration, particularly within the Department of Defense, that this was an unacceptable result and that something had to be done to change existing law and operational procedures to permit the interdiction of such shipments.<sup>145</sup> In consultation with other concerned

States, President Bush developed and announced the *Statement of Interdiction Principles* that States participating in PSI are “committed” to undertake.<sup>146</sup> Among those steps the *Statement* lists as appropriate is that the States will stop and search suspected vessels, and “enforce conditions on vessels entering or leaving their ports, internal waters, or territorial seas that are reasonably suspected of carrying [prohibited] cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.”<sup>147</sup> Although the *Statement* specifically provides that any actions taken under the PSI will be “consistent with national legal authorities and relevant international law and frameworks, including the United Nations Security Council,” some governments and observers are concerned that aspects of the PSI interdiction efforts beyond the limits of national jurisdiction may violate international law.<sup>148</sup> However, if done with the cooperation of the flag State and in compliance with the *Statement*, interdiction activities should not raise any legal problems. Moreover, the United States and its allies could use failure of the flag State to cooperate in the PSI as the basis for denying or restricting port entry to vessels registered in that State.

## (2) *Container Security Initiative*

Another recent initiative to combat the risk of international terrorist attacks on US ports is the CSI.<sup>149</sup> The CSI allows US customs agents, in coordination with foreign governments, to prescreen high-risk cargo containers at the port of departure.<sup>150</sup> Today the CSI process results in the preclearance of some 90 percent of the containers that enter US seaports and is in place in at least fifty major international seaports around the world.<sup>151</sup> The CSI process consists of four key elements: (1) using automated information to identify and target high-risk containers; (2) prescreening those containers identified as high risk before they leave foreign ports; (3) using up-to-date detection technology to quickly and efficiently prescreen high-risk containers; and (4) developing and using “smarter,” more secure tamper-proof containers.<sup>152</sup>

American citizens and allied nations expect that the United States will adopt port entry requirements that are reasonably related to the real threat, effectively designed to respond properly to it, and no more costly or intrusive than reasonably necessary. For example, a requirement that every vessel bringing containers into a US port must wait at a point 200 nautical miles from our shores until the US Coast Guard boards the vessel and opens and inspects every container on board would not violate international law.<sup>153</sup> However, given the millions of containers in transit, the practical impossibility of searching them while on board a vessel under way, and the costs and delays that any such effort would entail, this would be an unworkable and unwise policy.<sup>154</sup> The CSI, on the other hand, focuses on a relatively

small number of containers that security experts have determined to be “high risk.” Trained screening personnel, using the latest high-technology equipment, prescreen these “high risk” containers while they are readily accessible, before they are loaded on the vessel en route to the next port of call. Among other things, the recently enacted Security and Accountability for Every Port Act (SAFE Act) codifies the Customs-Trade Partnership Against Terrorism, a public-private sector initiative that offers international shipping companies benefits such as expedited clearance through US ports in exchange for improvements in their internal security measures.<sup>155</sup> Giving preferential access to vessels from CSI ports is an efficient, effective, legal and relatively inexpensive way to lower the threat of international terrorism.

The fourth key element of the CSI process is to use technology to develop and employ more secure containers. Perhaps the most promising option is to use the latest sensor and computer technology to continually monitor the location, status and cargo of each container. A requirement that every container entering the United States carry a fully functional, self-contained tamper-resistant embedded controller (TREC) would also be a reasonable condition of port entry, particularly if industry were to agree to participate voluntarily or if it were part of an IMO vessel security initiative.<sup>156</sup> TREC technology is rapidly being refined and becoming widely available.<sup>157</sup> Various companies are developing and deploying TRECs that use sophisticated operating systems and act as intelligent, real-time tracking devices. These devices are capable of detecting radiation, reporting tampering of the container and, when coordinated with shipping plans entered into a computer, identifying voyage routing and other anomalies.<sup>158</sup>

A pilot program is under way to permanently install such controllers on a large number of containers. Each unit uses the latest generation of satellite tracking devices and an advanced technology network for use by manufacturers, retailers, logistics providers, carriers and governments to share real-time cargo information. In addition to detecting unauthorized access to the container and providing a constant information stream as to location and status, the TREC controllers have the potential to constantly monitor each container’s contents to detect the presence of radioactive materials and chemical and biological weapons. Any anomaly could lead to a denial of port entry until such time as appropriate authorities could test the container offshore or at a safe location.

Moreover, by enabling them to know exactly where each container is in the world at all times, those depending on the shipments and efficient use of the containers would benefit enormously. For example, imagine that the BMW automobile plant located in Spartanburg, South Carolina is expecting a shipment of necessary component parts from Germany to arrive on August 1. Because of a

severe Atlantic hurricane, however, the container ship must delay its arrival by several days. In a just-in-time supply chain, such a delay could cause an expensive halt in the assembly line. Knowing of the disruption and to avoid that production delay, the factory might order an interim shipment of essential parts to be shipped by air. All of this could be done automatically, saving millions of dollars in production delay and unnecessary warehousing. Another key business advantage, particularly to the company that owns the shipping container, is that, as soon as the cargo is off-loaded, it would become immediately available to pick up another shipment. Except for the most efficient companies, no one currently keeps track of millions of such containers throughout the world. Detecting a weapon of mass destruction thousands of miles from the United States, while an absolutely priceless security benefit, would be “frosting on the cake” to the everyday value of a far more efficient global supply system.

A similar tamper-resistant device could be developed to be permanently affixed to each vessel in the world, no matter how small. Ideally, such devices could detect the presence of dangerous materials on board or keep track of, and report on, routing anomalies. If US policymakers were to determine that such devices on containers or vessels would contribute meaningfully to our maritime security, they could require that every vessel entering a US port be equipped with fully functional units as a condition of port entry. Global cooperation to develop the best possible technology, and an international agreement to require the use of such technology on all vessels, would be the best approach to the effective implementation of such requirements worldwide.

Even though the total cost to install a TREC on every container would be significant, unit costs would no doubt come down as mass production of the device was begun and makers competed for their portion of the market to equip millions of containers. Although the international community must expect growing pains as the CSI becomes fully operational, initiatives to prevent the “bomb in a box” or “bomb on board” scenario are important tools to protect homeland security and the international transportation network against the threat of paralyzing and expensive terrorist attacks.

### *(3) Automated Identification System*

Modern detection, information and communications technologies provide the potential capability to accomplish much of what needs to be done to enhance the security of the global maritime transportation system. Although initially introduced as a collision avoidance and maritime safety tool, the IMO has recently promoted AIS “as a mandatory prescription to the shipping industry’s fear of terrorism.”<sup>159</sup> Although there were growing pains as the technology was developed, AIS has

proven to be very helpful, both to mariners and flag and port State authorities. Even before the emphasis shifted to combating terrorism, maritime experts had identified satellite-based vessel monitoring systems as an invaluable tool for managing fisheries and for promoting maritime safety.<sup>160</sup> The Department of Homeland Security has statutory authority to implement regulations to fully implement AIS in the United States.<sup>161</sup> The Coast Guard also recognizes the need for such AIS information to improve Maritime Domain Awareness by monitoring vessels approaching the US coastline and, ultimately, to develop the intelligence necessary to help deter terrorist attacks on US ports.<sup>162</sup>

The Maritime Transportation Security Act of 2002<sup>163</sup> and the Coast Guard and Maritime Safety Act of 2004<sup>164</sup> required the Coast Guard to develop and implement a comprehensive vessel identification system. This system will enhance the Coast Guard's capabilities to monitor vessels that could pose a threat to the United States.<sup>165</sup> AIS is a relatively mature technology, having been a key component of IMO's marine safety system for years. All vessels using the Vessel Traffic Service while entering or leaving major ports in the United States must now employ AIS. Consistent with internationally agreed vessel equipment standards, AIS is compulsory on all large commercial vessels worldwide. Moreover, US law and regulations require that it be operational on larger vessels entering US waters.<sup>166</sup> The United States and its trading partners may further exploit AIS to keep track of vessels, with satellite AIS tracking on the near-term horizon.<sup>167</sup>

### *(4) Long-Range Identification and Tracking of Ships*

The Long Range Identification and Tracking of Ships system is another IMO initiative under SOLAS.<sup>168</sup> When it becomes fully operational in January 2009, LRIT will require ships to which the requirement applies (passenger ships, cargo ships over 300 gross tons, including high-speed craft, and mobile offshore drilling units on international voyages) to transmit their identities, locations, and dates and times of their positions.<sup>169</sup> That information may be accessed upon payment of the costs thereof by port States for those ships that intend to enter ports of that State. Most significantly, coastal States may obtain access to the information when the ship is a designated distance off that State's coast, not to exceed one thousand nautical miles.<sup>170</sup> As it is presently planned, there will be no interface between LRIT and AIS. One of the more important distinctions between LRIT and AIS, apart from the obvious one of range, is that, whereas AIS is a broadcast system available to all within range, data derived through LRIT will be available only to the SOLAS contracting-government recipients who are entitled to receive such information. As a result, the LRIT regulatory provisions have built-in safeguards to ensure the confidentiality of the data and prevent unauthorized disclosure or access. LRIT will be another

tool to keep track of vessels that might represent a security threat. Traditional freedom of navigation principles prevent a coastal State from requiring AIS or LRIT information on foreign-flag vessels merely navigating on the high seas or within the exclusive economic zone, or engaged in innocent or transit passage through the territorial sea. However, by adopting the AIS and LRIT amendments to SOLAS, contracting governments may obtain available AIS and LRIT information from other contracting States. Vessels from States that choose not to participate may be subject to extra scrutiny and delay, additional port access screening or reporting requirements, or even outright denial of entry to ports.

#### *(5) International Port Security Program*

In December 2002, the IMO adopted a new set of rules for all States and international shipping companies.<sup>171</sup> These rules included changes to the Safety of Life at Sea Convention through adoption of the ISPS Code. These came into effect on July 1, 2004. The ISPS Code requires States to assess the security risks at all port facilities and to ensure that port operators prepare and implement security plans. Shipping companies have to evaluate risks to their vessels and develop prevention and response plans. Moreover, ISPS requires that ships install AIS, develop ship security alert systems, create a permanent display of their vessel identification numbers and carry a valid International Ship Security Certificate. Assuming that vessels comply with the ISPS requirements, port States may not take enforcement action against the vessel, including denial of port entry, unless there are “clear grounds” for concluding that a vessel represents a security threat to the port State. Even then, international procedures encourage the port State to provide an opportunity for the vessel to rectify the non-compliance.

Under US law, the Coast Guard is responsible for determining whether foreign ports are maintaining effective anti-terrorism measures.<sup>172</sup> To do this, the Coast Guard created the International Port Security Program. It generally uses a State’s implementation of the ISPS Code as the key indicator as to whether it has effective anti-terrorism measures in place.<sup>173</sup> When the Coast Guard determines that a foreign port is not maintaining effective anti-terrorism measures (normally by its failure to fully implement the ISPS Code), the Coast Guard imposes conditions of entry on vessels arriving in the United States from a port of that State. These conditions of entry usually require that the vessel take additional security measures, both while in the foreign port and in the United States, to rectify the apparent non-compliance. In addition, the Coast Guard will issue a port security advisory concerning that port and publishes a notice in the Federal Register to provide public notice of its determination. Should a vessel not meet those conditions or

should there be additional “clear grounds” for concern, the vessel may be denied entry into the United States.

Before allowing it to enter its first US port of call, the Coast Guard must board and inspect each high-interest vessel before it enters the territorial sea or, depending on local conditions, shortly thereafter. Before the Captain of the Port will permit the vessel to enter the US port, the inspection team must first determine that the vessel has complied with special security conditions in the foreign port(s), conduct an inspection using radiation-monitoring equipment and impose certain additional security requirements.<sup>174</sup> If the vessel is unwilling to subject itself to any of these conditions or the inspection fails to resolve any security concerns, the COTP has the authority to impose various “control and compliance measures,” including denial of entry to the port.<sup>175</sup> Presently, the Coast Guard requires that foreign-flag vessels list the five previous foreign ports on which they have called.<sup>176</sup> Since any such measures would be designed to effectively reduce the risk of a terrorist attack on a US port, imposing such non-discriminatory conditions on port entry comports with international law. Vessels that meet the requirements of the ISPS Code and have called upon ports that are in compliance with the ISPS Code generally will not be considered to be of “high interest” and will not typically be required to undergo inspections beyond the US territorial sea.

The effect of the ISPS Code and efforts to implement it around the world means that today the IMO, the United States and the rest of the international shipping community has a much better handle than ever before on where all commercial vessels are at any one time, the nature of the potential security threat, how to avoid a terrorist incident and how best to respond to various other emergency situations.

### *(6) Other Programs Designed to Improve Vessel and Port Security*

At the IMO, within the US government, and in various international fora, responsible policy experts are engaged in an ongoing effort to review and improve programs designed to enhance the security of commercial vessels and ports. Time and space does not permit a comprehensive review of all the various proposals. Suffice it to note here that whatever international agreements the international community develops to improve security against potential terrorist attacks must include appropriate legal and policy bases on which to impose conditions on entry into port.

### **C. Denial of or Restrictions on Entry Related to Suspected Criminal Activity**

States have a right to require that vessels seeking to call on their ports will comply with relevant criminal laws and regulations designed to protect the peace and security of the port State. Port State authorities may deny entry to, or impose extensive

controls on, commercial vessels seeking access to their ports as they may deem necessary to ensure that any such vessels are not promoting criminal activities.

There is a vast array of potential criminal activities that can be promoted through port entry, ranging from the importation of illegal drugs, trafficking in women and children for various criminal purposes, maritime terrorism, illegal immigration, and other violations of customs and immigration laws and regulations. To combat such illegal activities, States may require vessels visiting their ports to submit to law enforcement boardings and investigatory screenings. Moreover, if flag States, particularly “open registry” or “flags of convenience” States, are unwilling to take appropriate action to ensure that vessels that they have registered are not engaged in criminal enterprises, a port State could appropriately deny entry to vessels from such States.<sup>177</sup> All States naturally see effective crime prevention as a vital State interest that justifies appropriate investigation and exercise of the sovereign right to close or protect access to their ports.

If a State is aware that a particular vessel, the vessels of a particular company, or the vessels operating under the flag of a particular State are engaged or likely to be engaged in criminal activity, that State’s port authorities may deny entry to that vessel or that group of vessels.<sup>178</sup> Likewise, these authorities may require that those vessels submit to a records review, a thorough search, and/or other personnel or cargo screening as a precondition for entry. To increase security in the transportation industry, the US Congress established a requirement that all “crewmembers on vessels calling at United States ports . . . carry and present on demand any identification that the Secretary decides is necessary.”<sup>179</sup> This has evolved into the Department of Homeland Security’s initiative to establish a transportation workers identification credential (TWIC) for workers in the maritime industry.<sup>180</sup> In the SAFE Port Act of 2006, Congress directed that persons convicted of certain crimes could not obtain a TWIC, and that the TWIC process be in place at the ten most vulnerable US ports by July 1, 2007, and that the process be in place for the forty most vulnerable ports by July 1, 2008.<sup>181</sup> The benefits of requiring and screening lists of crew and passengers in an NOA include the opportunity to detect those with criminal records. All of these conditions on entry are well established in traditional State practice.<sup>182</sup>

#### **D. Balancing the Right of Port Entry in Emergency Cases of *Force Majeure* or Distress with the Protection of the Vital Interest of the Port**

There is one set of circumstances where customary international law generally recognizes a vessel’s right to enter any port—where the ship is in distress due to *force majeure*.<sup>183</sup> Historically, a vessel in distress due to bad weather conditions, dangerous sea state, involvement in a collision, fire or other emergency condition threatening the loss of the vessel and the lives of those on board enjoyed a right to seek

refuge in a foreign port, bay or other protected internal waters of a foreign coastal State.<sup>184</sup> The 1982 LOS Convention recognizes the principles of *force majeure* and distress as permitting a ship to stop and anchor when in innocent or transit passage.<sup>185</sup> Moreover, both coastal States and individual mariners have an obligation to take affirmative action to render assistance to vessels and persons “in danger of being lost at sea.”<sup>186</sup>

As a general rule, vessels in distress have a right of entry into the internal waters of a port State to seek shelter without first obtaining permission from that State, especially when there is the real risk that the vessel might be lost, thus putting the lives of those on board at genuine risk.<sup>187</sup> Moreover, the sovereign authority of the port State does not generally apply to vessels forced to seek refuge in a port by *force majeure* or other necessity, except as may be necessary to ensure the safe and efficient operation of the port.<sup>188</sup> Under long-standing principles of customary international law, therefore, when a vessel is in extremis and must take shelter in a safe harbor, the port State may not exclude the vessel from its internal waters and may “not take advantage of the ship’s necessity” in any way.<sup>189</sup>

On the other hand, port States have a right to protect themselves and their citizens under the principle of self-preservation. This basic principle gives such States the right, indeed the fundamental responsibility, to keep dangerous instrumentalities and conditions away.<sup>190</sup> As Professors McDougal and Burke expressed it: “[I]f the entry of the vessel in distress would threaten the health and safety . . . of the port and its populace, exclusion may still be permissible.”<sup>191</sup> The Netherlands Judicial Division of the Council of State recently considered the conditions under which a badly damaged Chinese vessel had a right to enter Dutch waters for the purpose of effecting repairs in a shipyard:<sup>192</sup>

[U]nder international law [a State] may not go so far as to prevent a ship which is in distress and requires repairs from entering territorial and coastal waters and seeking safety in a port or elsewhere along the coast. In such case, the seriousness of the situation in which the ship finds itself should be weighed against the threat which the ship poses to the coastal State.

Thus, the right to seek refuge does not extend to situations in which greater damage or loss of life may result were the vessel to enter. The port State must balance the emergency on the vessel with the threat to its own people and nation. Given the national security sensitivities in the world today, it seems unlikely that any vessel in distress today can demand entry to any port at any time. Instead, port State authorities may well conclude, based on all the relevant factors, that permitting a vessel entry into its port or internal waters represents an unacceptable threat to vital port

State interests, and take all necessary action to bar entry. However, the doctrine of *force majeure* continues to represent a viable basis for requesting such access and, in most cases, fully expecting to find safe refuge. Moreover, if port State authorities deny or condition entry, they should be able to articulate a defensible basis for doing so. Finally, if the port State denies entry, that State's authorities, and the masters of any vessels in a position to assist, must provide appropriate aid to preserve the lives of any mariners or other persons in distress.<sup>193</sup>

#### ***V. Domestic Authority and Practical Procedures for Denying Port Entry***

Even if a port State has the international legal right to deny entry to its ports to a particular vessel in the interests of maritime security, the cognizant officials must usually have explicit domestic authority to do so. While a country's head of State or legislative body could formally advise another State that vessels flying its flag are not welcome within its ports (such as Japan and Australia have recently done with respect to vessels flying the North Korean flag and the international community is doing to enforce UN sanctions against Iran), most decisions are made by lower-level functionaries seeking to apply domestic law designed to promote the interests of the State. Since there is a general presumption of entry for foreign-flag commercial vessels, an official who determines that a vessel may not enter under certain circumstances must generally have the domestic legal authority to do so. Otherwise, that official and his agency may experience legal and political complications for engaging in an *ultra vires* act or failing to follow mandated procedures. This might even result in a lawsuit and/or political or diplomatic pressures if the responsible official has taken unauthorized or illegal action to the detriment of the foreign-flag shipping company and the domestic interests using that vessel to engage in international trade. In other words, even if a State has the international legal right to prevent entry, the exercise of that right must be carried out in accordance with domestic legal authority and following established procedures.

In the handful of reported decisions that have focused on the denial of port entry in the United States, the aggrieved party has generally taken the position that the officials who have made the decision to do so have acted contrary to domestic law and policy. In *Canadian Transport Co. v. United States*, for example, a Canadian corporation brought an action for damages for the Coast Guard's refusal to permit a vessel employing a Polish master and several Polish officers entry to the harbor in Norfolk, Virginia.<sup>194</sup> The appellate court observed that "if the Coast Guard officers acted arbitrarily and in violation of regulations in diverting [the foreign merchant vessel], the United States is not immune from a damage action . . ."<sup>195</sup>

In a more recent case, *Humane Society of the United States v. Clinton*,<sup>196</sup> plaintiffs successfully sued President Clinton and the Secretary of Commerce because of the federal government's failure to take timely action to sanction Italian driftnet fishing vessels when these government officials had, or should have had, reasonable cause to believe that such vessels persisted in employing excessively long driftnets in violation of an international treaty and the implementing statute.<sup>197</sup> The US Court of International Trade concluded that "nine confirmed sightings [of illegal driftnet fishing by Italian vessels] combined with the numerous allegations make the Secretary's refusal to identify Italy a second time arbitrary, capricious and not in accordance with the Driftnet Act."<sup>198</sup>

Existing federal statutes and regulations give the Coast Guard rather broad power to deny port entry and control operations within US waters of foreign-flag vessels found to be in violation of laws, regulations or treaties to which the United States is a party. The Ports and Waterways Safety Act of 1972, as amended,<sup>199</sup> specifically authorizes the Secretary of Homeland Security (delegated to the cognizant Coast Guard District Commander and COTP) to deny port entry to any US port or navigable waters if "he has reasonable cause to believe such vessel does not comply with any regulation issued under this chapter or any other applicable law or treaty."<sup>200</sup> Implementing regulations provide that "[e]ach District Commander or Captain of the Port . . . may deny entry into the navigable waters of the United States . . . to any vessel not in compliance with the provisions of the [Act] or the regulations issued thereunder."<sup>201</sup> Later in that regulation, the District Commander or COTP is given authority to order a vessel to operate in a particular manner whenever he "has reasonable cause to believe that the vessel is not in compliance with any regulation, law or treaty . . ."<sup>202</sup>

When a port State has good cause to deny port entry to a foreign-flag vessel and decides to do so, it has an obligation to notify the vessel's master, its flag State and its owner(s) in as timely a manner as is reasonable under the circumstances. The President, Secretary of State, appropriate US ambassador or other authorized State Department official could communicate to the appropriate flag State that a particular vessel may not call upon ports in the United States because of its violation of an international convention or domestic law. However, under existing US procedures, appropriate Coast Guard officials normally carry out the process of denying port entry to a foreign-flag vessel where US laws and regulations require or authorize it. The cognizant District Commander or COTP normally issues an order to the vessel denying port entry. Such an order should include a summary of the factual situation, the basis for denying port entry, the legal authority for taking such action, the circumstances under which the order would be rescinded, the potential penalties for violating the order, the process for appealing the order and the office

which the recipient of the order could call for any questions. Such an order should be communicated not only to the vessel in question, but also to its owners, agents and flag State.

Anytime that the United States seeks to deny port entry to a foreign-flag vessel, even to a foreign warship, fishing vessel or merchant vessel that is in clear violation of a law, regulation or treaty obligation, it must find the authority for denying such entry and comply with basic due process requirements of notice and an opportunity to be heard. Particularly involving issues related to homeland security, the Coast Guard and other cognizant agencies employ the Maritime Operational Threat Response (MOTR) coordination process to effectively align and integrate “responses to real or potential terrorist incidents across all stakeholders” in the federal government.<sup>203</sup> If Congress and cognizant agencies consider that denial of port entry to certain foreign-flag vessels under particular circumstances promotes key interests of the United States, there should be laws, regulations and procedures in place to carry out such a policy. Otherwise there are likely to be legal, political and practical consequences for the denial.

## ***VI. Evaluation and Development of an Analytical Matrix***

One of the key purposes of this paper is to develop a methodology to evaluate proposed and actual conditions that the United States and other port States seek to impose on foreign-flag vessels to promote maritime security. This section will evaluate both the legal and policy factors that affect the imposition of such conditions and then propose an analytical methodology in determining whether a particular condition on port entry is an appropriate way to promote a particular policy goal. The final part of this section will emphasize the need and importance of harmonizing port State regulations with international expectations and procedures.

### **A. Evaluating Legality and Policy for Imposing Port Entry Conditions**

As discussed in detail above, international law permits port States to impose reasonable conditions on the entry of foreign vessels into ports. Promoting maritime security is clearly a reasonable, if not essential, policy goal. However, the international community presumes that, as a general rule, commercial vessels will have access to the ports into which they need to enter to engage in global trade. To be consistent with international law, any conditions on port entry must be based on important national goals, must be directly and effectively related to accomplishing one or more of these goals and must be objectively prudent and necessary under all the circumstances. Any effort to impose conditions on port entry of a foreign-flag vessel involves a claim of jurisdiction over the vessel for certain

purposes. A port State may not deny entry or exercise jurisdiction with respect to a foreign-flag vessel or its activity when the exercise of such jurisdiction would be arbitrary, discriminatory, unreasonable, in violation of treaty obligations or otherwise improper.<sup>204</sup>

### **B. Determination of “Reasonableness”**

Although individual States, the international community and legal commentators may often differ as to when the imposition of conditions or the exercise of jurisdiction is reasonable under various circumstances, it is important to make an effort to determine whether the imposition of such restrictions would be reasonable. In determining whether the exercise of jurisdiction over a vessel or its activity as a condition of port entry is appropriate or not involves consideration of a number of relevant factors. Questions that a port State and the international community might appropriately ask in determining the reasonableness of a law or regulation conditioning port entry or imposing jurisdiction upon a vessel’s arrival in port include:

- (1) Is the policy interest(s) that the law or regulation is designed to address one of significant importance to the port State?
- (2) Does the harm(s) to be avoided, or the benefit(s) to be achieved, have a direct connection to the foreign vessel’s presence while operating in the coastal waters of the port State?
- (3) Does the regulated activity have a close geographical and temporal nexus to the entry of the vessel into the waters of the port State?
- (4) Will the law or regulation be effective in accomplishing the policy goal(s) for which it was implemented?
- (5) Would the exercise of jurisdiction under the circumstances violate an applicable bilateral or multilateral convention or the relevant provisions of customary international law?
- (6) Will the law or regulation have the practical effect of denying or impeding freedom of navigation in international waters, or the exercise of the rights of innocent passage, transit passage and archipelagic sea lanes passage, as provided in the 1982 LOS Convention?
- (7) Is there domestic legal authority for denying port entry, and have the appropriate authorities complied with the procedural requirements to

notify the vessel of the denial and included an opportunity to be heard on the matter?

(8) Is there a less intrusive, disruptive, expensive, complicated or objectionable way to accomplish the same policy goal(s)?

Each of these questions is relevant in determining the reasonableness of the law or regulation under consideration. States considering whether or not to enact such laws or impose such regulations should evaluate them to ensure they are objectively reasonable.

### **C. Harmonizing Regulations with International Law and Expectations**

Even where the port State can demonstrate that the proposed regulation is important and that, under the factors discussed above, it is objectively reasonable, it is important to harmonize the proposed regulation with relevant international standards and expectations. The best way to accomplish this is to obtain the approval of the “competent international organization” charged with regulating the particular activity. If a port State wanted to establish a traffic separation scheme for vessels engaged in innocent passage through its territorial sea on the way into internal waters, international law requires that it take into account “the recommendations of the competent international organization.”<sup>205</sup> Before establishing such schemes within international straits used for international navigation, the 1982 LOS Convention requires that the “States bordering the straits shall refer proposals to the competent international organization with a view to their adoption.”<sup>206</sup> Within the exclusive economic zone, a coastal State may “adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards . . . .”<sup>207</sup> Based on comity and efficiency, all States should seek to harmonize their national expectations, standards and procedures with those of the international community.

The 1982 LOS Convention provides for coordinating proposals that affect international shipping, particularly with respect to navigational safety and the protection of the marine environment, within the IMO process. The IMO has proven particularly adept at reaching consensus, and then harmonizing national and international standards and expectations for a wide variety of issues ranging from vessel construction through bilge-water-discharge standards. The 1965 Convention on Facilitation of International Maritime Traffic, which the IMO has updated regularly, emphasizes the importance of simplifying and reducing to a minimum the administrative burdens imposed on international shipping “to facilitate and expedite international maritime traffic . . . .”<sup>208</sup>

Any measures designed to protect port State interest must also be instituted in such a way so as to avoid the practical effect of denying or impeding freedom of navigation as provided in the 1982 LOS Convention. Those interested in the law of the sea must be concerned about the potential impact that restrictions on port entry might have on vessels merely engaged in transit passage, innocent passage or high seas navigation in the exclusive economic zone of another State. Some of the restrictions on port entry under consideration by some port States, such as Australia's recent decision to require pilots on most vessels transiting the Torres Strait, threaten traditional navigational freedoms and undermine long-standing principles of the law of the sea.<sup>209</sup> Others are less objectionable, because they bind only State parties. These include a provision of the recently adopted Wreck Removal Convention, which imposes a requirement that each State party shall ensure that any ship entering or leaving a port or offshore terminal provide evidence of financial security.<sup>210</sup> Another trend in multilateral treaties is to require that States party bar entry to their ports for fishing vessels determined to have been engaged in illegal, unregulated and unreported fishing activities. Another issue that requires consideration is the possible impact of conditions on entry with trade agreements. Since World War II, multilateral efforts have sought to reduce barriers to international trade, while ensuring a level playing field. These efforts first resulted in the General Agreement on Tariffs and Trade (GATT). During the 1990s, negotiations led to the establishment of the World Trade Organization (WTO), which took over most of the functions of GATT. Although the WTO/GATT process is silent on the specific issue of vessel access to ports, the denial of a right of port entry could well be seen as a trade barrier inconsistent with a nation's responsibility under its provisions. Moreover, if a port State were to treat vessels flying various foreign flags differently, the WTO/GATT rules may apply to prevent discrimination or favorable treatment being given to vessels from member States.<sup>211</sup> However, in practice, there is little real danger of a successful challenge when the port State is seeking to promote legitimate concerns, such as environmental protection, vessel safety and homeland security. As Professor Ted Dorman put it,

While the international trade agreements administered by the W.T.O. may affect the ability of a port state to deny access to foreign vessels or to impose burdensome conditions on foreign vessels entering port, the effect is limited to those situations where the port state is using port access as a means to deny entry of the goods being carried by the vessel . . .<sup>212</sup>

As discussed earlier in this article, any regulations designed to restrict entry to US ports must also be consistent with our international obligations under any bilateral FCN treaties to which the US is party.

## **VII. Recommendations and Conclusion**

For the good of the entire world community, policymakers must seek to ensure that ocean trade continues to flourish and grow. This requires promoting access to key ports with minimal restrictions and conditions. Toward this end, international law presumes that the ports of every port State should be open to all foreign commercial vessels, and a port may be closed or a vessel denied entry to the port only when important interests of the port State justify the closure.

At the same time, the world community must be sensitive to the legitimate concerns of port States to protect important national interests, particularly maritime safety and security. To promote and protect these and other important interests, port States have a right to close their ports or to impose conditions on port entry and exit with respect to a broad range of important interests directly related to the vessel's visit. A port State may restrict entry to all foreign vessels, subject only to any rights of entry clearly granted under an applicable treaty and those vessels in distress due to *force majeure*.

To avoid using international trade as a heavy-handed and ineffective diplomatic tool designed to reward or punish foreign States, however, a port State should not impose port entry or exit requirements on foreign merchant vessels—or exercise jurisdiction on foreign-flag vessels in port—even those designed to promote important goals, that are not reasonably related to the visit of the vessel in question on the specific occasion. Toward this end, absent specific, identifiable concerns with respect to the vessel or State in question, a port State should treat all foreign-flag vessels equally, and not discriminate in the prescription and enforcement of its laws.

The application of the law of the port State should not have the practical effect of denying or impairing the traditional rights of the sea, including freedom of navigation in international waters, or the exercise of the rights of innocent passage, transit passage and archipelagic sea lanes passage, in coastal waters. Moreover, denial of port entry, or imposing unreasonable conditions on port entry, has an adverse impact on the port State's ability to engage in international trade. As a result, such restrictions harm the economy of both the port State and, to a less direct extent, the world community at large.

Given the crucial importance of international trade in today's global economy, incremental costs, short delays or minor disruptions can have a profoundly adverse impact. In this regard, harmonizing and coordinating conditions on port entry

throughout the world community, with similar expectations, requirements, forms and procedures, can achieve the goals without imposing as much of an administrative burden. Wisely balancing the benefits to be achieved from imposing conditions on port entry, such as intelligently devised security requirements, against the costs and burdens associated with each, is essential. International lawyers and policymakers must strive to ensure that access to the world's ports is as free as reasonably possible, and that conditions on entry and exit are directly and effectively related to the important interests of the port State and the world community at large. The goal of all States should be to promote and ensure safe, secure, efficient and environmentally sound international ocean trade.

### *Notes*

1. MYRES S. McDUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS 90 (1962).
2. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 512 rep. n. 3 (1987) [hereinafter RESTATEMENT]. See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 175 (7th rev. ed. 1997) ("Although a coastal state has the right to forbid foreign merchant ships to enter its ports, most states are keen to support trade, and therefore welcome foreign ships to their ports."); McDUGAL & BURKE, *supra* note 1, at 99–100.
3. Saudi Arabia v. Arabian American Oil Company (Aramco), Award of Aug. 23, 1958, 27 I.L.R. 117, 212 (dictum). This statement represents commercial policy and comity and, according to one expert, has no "substantive basis" in international law. A.V. Lowe, *The Right of Entry into Maritime Ports in International Law*, 14 SAN DIEGO LAW REVIEW 597, 621 (1977).
4. C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA §§ 181, 176 (6th ed. 1967). "The entry of foreign merchant ships may thus be reasonably regulated provided no hindrance is put in the way of international trade and no discrimination made between States so as to favour some at the expense of others." *Id.* at § 177.
5. RESTATEMENT, *supra* note 2, § 512 cmt. c (1987).
6. "Coastal states have a sovereign right to grant or to deny access to their ports to any foreign vessel." Louise de La Fayette, *Access to Ports in International Law*, 11 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 1, 2 (1996).
7. Professors Churchill and Lowe have commented that the "dictum [in the *Aramco* case] is not supported by the authorities cited by the tribunal, and there is almost no other support for the proposition." R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 62 (3d ed. 1999).
8. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994), available at [http://www.un.org/Dept/los/convention\\_agreements/text/unclos/clos.index.htm](http://www.un.org/Dept/los/convention_agreements/text/unclos/clos.index.htm) [hereinafter 1982 LOS Convention].
9. Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 830, 844 (2006) (footnote referring to 1982 LOS Convention, arts. 25(2) and 211(3), omitted).
10. 1982 LOS Convention, *supra* note 8, art. 25(2). The United States has not yet acceded to the Convention. However, this same principle is codified in Article 16(2) of the 1958 Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, to which the United States is a party.

11. See President Ronald Reagan, Statement on United States Ocean Policy, Mar. 10, 1983, 22 INTERNATIONAL LEGAL MATERIALS 464 (1983), reprinted in 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 619 (1983); see also ARND BERNAERTS, BERNAERTS' GUIDE TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 14–15 (2006).

12. See Lowe, *supra* note 3, at 597–625. See also GEORGE C. KASOULIDES, PORT STATE CONTROL AND JURISDICTION: EVOLUTION OF THE PORT STATE REGIME 1–22 (1993).

13. Lowe, *supra* note 3, at 622 (footnote omitted).

14. La Fayette, *supra* note 6, at 1 (emphasis in original).

15. United States v. Louisiana, 394 U.S. 11, 22 (1969).

16. Laurizen v. Larsen, 345 U.S. 571, 592–93 (1953).

17. An embargo is one of the tools available to the international community, or a nation-State, to seek to change the behavior of another nation-State. UN Charter art. 41. So are economic reprisals. In 1984 the United States closed its ports to vessels flying the Nicaraguan flag as part of an economic sanctions package in retaliation for the guerrilla war that the government of Nicaragua was waging against its neighbors. Dan Morgan, *Why the Nicaragua Embargo?*, WASHINGTON POST, May 5, 1985, at C5.

18. According to one federal appeals court, US cases contain no precedents that “the law of nations accords an unrestricted right of access to harbors by vessels of all nations.” Khedivial Line, S.A.E. v. Seafarers’ Int’l Union, 278 F.2d 49, 52 (2d Cir. 1960). “In any event, the law of nations would not require more than comity to the ships of a foreign nation” and in the specific context the Court addressed it noted that American vessels were harassed in the ports of the United Arab Republic. *Id.*

19. For a good example of one State’s approach, see the 1995 Norwegian Regulations Governing Pilotage and Entry to Norwegian Waters (June 20, 1995), available at <http://www.state.gov/www/global/oes/oceans/ntrvo113.html>.

20. CHURCHILL & LOWE, *supra* note 7, at 107 (footnote omitted).

21. “In the case of warships, the assertion of comprehensive authority to exclude most frequently takes the form of establishing limiting conditions for entry, with particular emphasis upon the necessity for giving notice of intended visits.” McDougall & Burke, *supra* note 1, at 94. See also *id.* at 114–15.

22. “[T]he right [of port States] to exclude foreign warships is undoubtedly.” CHURCHILL & LOWE, *supra* note 7, at 61. See also LOUIS B. SOHN & JOHN E. NOYES, CASES AND MATERIALS ON THE LAW OF THE SEA 377–78 (2004) (treaties of friendship, commerce and navigation usually do not provide for warship access).

23. See, e.g., Straddling and Highly Migratory Fish Stocks Agreement art. 23, Dec. 4, 1995, 34 INTERNATIONAL LEGAL MATERIALS 1542, 1567 (1995) (“Measures taken by a port State”).

24. The general practice of the free access of merchant ships of almost all nations to almost all commercial ports is based upon convenience and economic interest, and in the absence of treaty provisions, it is not based upon any sense of legal obligation . . . [A] coastal state can impose special regulations with regard to fishing boats and privately owned pleasure and racing yachts and boats. For this reason, they form separate categories.

V.D. Degan, *Internal Waters*, 17 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 3 (1986).

25. For example, in 1985 New Zealand announced that it would not permit nuclear-capable US warships to enter its ports absent an official statement confirming that no such weapons were on board. See STUART McMILLAN, NEITHER CONFIRM NOR DENY: THE NUCLEAR SHIPS DISPUTE BETWEEN NEW ZEALAND AND THE UNITED STATES (1987).

26. “There is a presumption that ports traditionally designated for foreign trade are open to all ships and that the arbitrary closure of a port gives rise to a right of protest and, under certain circumstances, liability for damages.” Ademuni-Odeke, *Port State Control and UK Law*, 28 JOURNAL OF MARITIME LAW AND COMMERCE 657, 660 (1997) (footnote omitted).

27. CHURCHILL & LOWE, *supra* note 7, at 63.

28. “A coastal state can condition the entry of foreign ships into its ports on compliance with [its] laws and regulations.” RESTATEMENT, *supra* note 2, § 512 rep. n. 3.

29. See International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 276, XI-2, Reg. 9/2.1.6 [hereinafter SOLAS Convention]; International Ship and Port Facility Security (ISPS) Code, Part B 4.39. For details on the current status of the SOLAS Convention and its amendments, see [http://www.imo.org/Conventions/contents.asp?topic\\_id=257&doc\\_id=647](http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647). See also Ports and Waterways Safety Act of 1978, Pub. L. No. 95-474, § 2, 92 Stat. 1472 (codified at 33 US Code § 1223(a)(5) and implemented by 33 C.F.R. § 160.201 *et seq.*)

30. An FCN treaty usually provides guarantees for the access of foreign vessels to ports and their subsequent departures. See, e.g., Treaty of Friendship, Commerce, and Navigation, US-Italy, arts. XIX(3) and XX(1), Feb. 2, 1948, 63 Stat. 2256, 2284. Even then, however, FCN treaties do not preclude a port State from denying access to vessels flying the flag of the other State party to protect essential interests. MCDUGAL & BURKE, *supra* note 1, at 109. The provisions of most FCN treaties provide for restricting access when “necessary for the protection of the essential interests . . . in time of national emergency.” Treaty of Friendship, Commerce and Navigation, US-Japan, art. XXI, Apr. 2, 1953, 4 U.S.T. 2063.

31. Professors Churchill and Lowe opined that the power to condition access could be limited. CHURCHILL & LOWE, *supra* note 7, at 63. See also Ademuni-Odeke, *supra* note 26, at 660 (“[T]he arbitrary closure of a port gives rise to a right of protest and, under certain circumstances, liability for damages.”).

32. The normal practice in these FCN agreements is to exclude fishing vessels and warships from the port access provisions, except in cases of distress. MCDUGAL & BURKE, *supra* note 1, at 109–10 & n.59.

33. CHURCHILL & LOWE, *supra* note 7, at 65, 98–99. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 147 (1812) (“[A] public armed ship, in the service of a foreign sovereign, . . . should be exempt from the jurisdiction of the country.”). See also 1982 LOS Convention, *supra* note 8, arts. 30–33, 95–96.

34. See RESTATEMENT, *supra* note 2, § 457, rep. n. 7, and § 512, rep. n. 6; CHURCHILL & LOWE, *supra* note 7, at 99 (“[T]he flag State is responsible for loss to the coastal State . . .”). See also 1982 LOS Convention, *supra* note 8, arts. 30–33 and 42(5).

35. London Convention on the Facilitation of International Maritime Traffic art. 1, Apr. 9, 1965, 18 U.S.T. 411, 591 U.N.T.S. 265 [hereinafter FAL Convention]. See Jochen Erler, *The New Convention on Facilitation of International Maritime Traffic*, 13 MCGILL LAW JOURNAL 323, 323–28 (1967). Cf. 1982 LOS Convention, *supra* note 8, art. 255 (“States shall adopt reasonable rules, regulations and procedures to promote and facilitate marine scientific research [including], subject to the provisions of their laws and regulations, access to their harbours . . .”).

36. See FAL Convention, *supra* note 35, art. 16. See also COLOMBOS, *supra* note 4, § 181, at 177. “The entry of foreign merchant ships may thus be reasonably regulated provided no hindrance is put in the way of international trade and no discrimination made between States so as to favour some at the expense of others.” *Id.* Interestingly, the 1982 LOS Convention does not specifically provide for an equal-treatment port-access regime, except in the limited circumstances of land-locked States. “Ships flying the flag of land-locked States shall enjoy treatment

equal to that accorded to other foreign ships in maritime ports.” 1982 LOS Convention, *supra* note 8, art. 131.

37. Stephen E. Flynn, *America the Vulnerable*, 81 FOREIGN AFFAIRS, Jan.–Feb. 2002, at 60, 66.
38. Quoted in April Terreri, *International Trade is Less Secure Than You Think*, WORLD TRADE MAGAZINE, Sept. 4, 2006, available at [http://www.worldtrademag.com/CDA/Articles/Feature\\_Article/d37c5947e0c7d010VgnVCM100000f932a8c0](http://www.worldtrademag.com/CDA/Articles/Feature_Article/d37c5947e0c7d010VgnVCM100000f932a8c0).
39. See J.M. ROBERTS, HISTORY OF THE WORLD 73–99, 333–34, 441–505 (1993). See also A Century of Free Trade, BBC NEWS, Feb. 12, 2003, <http://news.bbc.co.uk/1/hi/business/533716.sm>.
40. International Trade, ENCYCLOPEDIA BRITANNICA ONLINE (2007), <http://www.britannica.com/eb/article-9106321/international-trade>.
41. Andrew Marshall, *Waterway to the World*, TIME ASIA MAGAZINE, July 25, 2006, available at <http://www.time.com/time/asia/2006/journey/strait.html>.
42. US DEPARTMENT OF HOMELAND SECURITY, SECURE SEAS, OPEN PORTS: KEEPING OUR WATERS SAFE, SECURE, AND OPEN FOR BUSINESS 3 (2004), available at [http://www.piersystem.com/posted/586/DHSPortSecurityFactSheet\\_062104.41841.pdf](http://www.piersystem.com/posted/586/DHSPortSecurityFactSheet_062104.41841.pdf).
43. John D. Haveman, Howard J. Shatz & Ernesto A. Vilchis, *U.S. Port Security Policy after 9/11: Overview and Evaluation*, 2 JOURNAL OF HOMELAND SECURITY & EMERGENCY MANAGEMENT 1 (2005), available at <http://www.bepress.com/jhsem/vol2/iss4/1>. “Multimodal” means the ability to transfer shipping containers quickly to and from ocean vessels and other transportation modalities, such as rail cars, trucks, barges and airplanes.
44. OFFICE OF STATISTICAL & ECONOMIC ANALYSIS, MARITIME ADMINISTRATION, US DEPARTMENT OF TRANSPORTATION, VESSEL CALLS AT U.S. PORTS (2004), ix–x, 16–20 (July 2005), available at [http://www.marad.dot.gov/Marad\\_Statistics/vcalls2004.pdf](http://www.marad.dot.gov/Marad_Statistics/vcalls2004.pdf) [hereinafter MARAD].
45. K. Lamar Walters III, *Industry on Alert: Legal and Economic Ramifications of the Homeland Security Act on Maritime Commerce*, 30 TULANE MARITIME LAW JOURNAL 311, 323–24 (2006).
46. *Id.* at 323. See also Jeremy Firestone & James Corbett, *Maritime Transportation: A Third Way for Port and Environmental Security*, 9 WIDENER LAW SYMPOSIUM JOURNAL 419, 422 (2002–03).
47. Energy Information Administration, US Department of Energy, Crude Oil and Total Petroleum Imports Top 15 Countries, Jan. 17, 2007, [http://www.eia.doe.gov/pub/oil\\_gas/petroleum/data\\_publications/company\\_level\\_imports/current/import.html](http://www.eia.doe.gov/pub/oil_gas/petroleum/data_publications/company_level_imports/current/import.html). Canada is the single nation providing the largest source of foreign oil to the American market. *Id.*
48. US LNG imports have been growing dramatically in recent years. The primary sources of LNG for consumption in the United States include Trinidad and Tobago, Algeria and Nigeria. Energy Information Administration, US Department of Energy, U.S. Natural Gas Imports by Country, last updated Jan. 18, 2007, [http://tonto.eia.doe.gov/dnav/ng/ng\\_move\\_impc\\_s1\\_m.htm](http://tonto.eia.doe.gov/dnav/ng/ng_move_impc_s1_m.htm).
49. U.S. COAST GUARD, THE U.S. COAST GUARD STRATEGY FOR MARITIME SAFETY, SECURITY, AND STEWARDSHIP 18 (2007), available at <http://www.uscg.mil/comdt/speeches/docs/CGS-Final.pdf>. See also Natural Gas Intelligence, North American LNG Import Terminals, Nov. 6, 2006, <http://intelligencepress.com/features/lng/>.
50. MARAD, *supra* note 44. See also Firestone & Corbett, *supra* note 46, at 422.
51. See Pearl Harbor Attack, ENCYCLOPEDIA BRITANNICA ONLINE (2007), <http://www.britannica.com/eb/article-9058877/Pearl-Harbor-attack>.
52. See Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment*, 27 HARVARD JOURNAL OF LAW & PUBLIC POLICY 737, 738–40 (2003–04); Steven M. Kosiak, *The Cost and Funding*

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of the Global War on Terror (GWOT), Jan. 18, 2007, <http://www.comw.org/pda/fulltext/0701kosiak.pdf> (testimony before Congress).

53. See MICHAEL E. O'HANLON, PROTECTING THE AMERICAN HOMELAND: A PRELIMINARY ANALYSIS 7 (2002) (explaining that not only would such a port-security disaster cause mass casualties and destruction, it would require shutting down the US maritime import and export systems, causing maritime gridlock, the economic collapse of many businesses and possible economic losses totaling \$1 trillion).

54. "It is feared that terrorists could use the ubiquitous, anonymous, and largely innocuous steel boxes and their transport system to devastating effect." MICHAEL D. GREENBERG ET AL., MARITIME TERRORISM: RISK AND LIABILITY 111–14 (2006) (footnote omitted). See Justin Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 341, 348–51 (2002–03); Stephen E. Flynn, *Homeland Security Is a Coast Guard Mission*, US NAVAL INSTITUTE PROCEEDINGS, Oct. 2001, at 72, 72–73.

55. Eben Kaplan, Liquefied Natural Gas: A Potential Terrorist Target?, Feb. 27, 2006, <http://www.cfr.org/publication/9810/>. See also August Gribbin, *Seaports Seen as Terrorism Target: U.S. Will Secure Harbors, but Actions Likely to Hurt Trade*, WASHINGTON TIMES, Jan. 22, 2002, at A1. There have been disturbing reports of terrorists hijacking supertankers, practicing handling them and then stealing manuals on vessel operations before leaving the ship. See Gal Luft & Anne Korin, *Terrorism Goes to Sea*, FOREIGN AFFAIRS, Nov.–Dec. 2004, at 61, 68–70.

56. Mellor, *supra* note 54. See also Paul W. Parformak, *Liquefied Natural Gas (LNG) Infrastructure Security: Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, 25–26 (2005), available at <http://ncseonline.org/nle/crsreports/05mar/RL32073.pdf>.

57. Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)).

58. Jonathan Medalia, *Terrorist Nuclear Attacks on Seaports: Threat and Response*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 1, 1–2 (2005); Mellor, *supra* note 54, at 346–47 (focusing on the problem of weapons shipped into the United States in a cargo container); see Flynn, *supra* note 37, at 72–73 (the United States has a pressing need to defend against terrorist attacks at vulnerable seaports).

59. According to one study, a ten-kiloton weapon detonated in a major seaport would kill as many as one million people and inflict as much as \$1.7 trillion dollars in property damage, trade disruption and indirect costs. CLARK C. ABT, EXECUTIVE SUMMARY: THE ECONOMIC IMPACT OF NUCLEAR TERRORIST ATTACKS ON FREIGHT TRANSPORT SYSTEMS IN AN AGE OF SEAPORT VULNERABILITY 3 (2003), available at [http://www.abtassociates.com/reports/ES-Economic\\_Impact\\_of\\_Nuclear\\_Terrorist\\_Attacks.pdf](http://www.abtassociates.com/reports/ES-Economic_Impact_of_Nuclear_Terrorist_Attacks.pdf).

60. See Section IV *infra* ("Conditions on Entry Related to National Defense, Homeland Security, Counterterrorism and Law Enforcement Concerns").

61. Convention and Statute on the International Régime of Maritime Ports art. 3, annexed to the Convention on the International Régime of Maritime Ports, Dec. 9, 1923, 28 L.N.T.S. 115. The United States is not party to either the Statute or the Convention on the International Régime of Maritime Ports. "[A]lthough ratified by only a small number of states, [the 1923 Convention] reflects largely customary rules of international law." BERNAERTS, *supra* note 11, at 111.

62. See, e.g., 46 App. US Code § 91; 46 US Code §§ 42107 and 52305 (2006) ("Refusal of clearance and entry").

63. 46 App. US Code §§ 121–35. Note that tonnage duty is to be paid based on the displacement of the vessel, while the tariff or customs duty is a separate levy based on the value of the imported merchandise.

64. See, e.g., 8 US Code §§ 1181 (“Admission of immigrants into the U.S.”), 1281–87 (“Alien crewmen”).

65. See, e.g., 42 US Code §§ 264–72; and 9 C.F.R. § 93.106 (“Quarantine requirements” for animals and plants being imported into the United States).

66. Congress has provided statutory authority for controlling infectious diseases, including the quarantining of suspect vessels and their crews and passengers. 42 US Code §§ 264–72. The President regularly updates the list of communicable diseases subject to quarantine. Exec. Order No. 13,295, Apr. 4, 2003, 68 Fed. Reg. 17,255 (Apr. 9, 2003), *reprinted in* 42 US Code § 264, as amended by Exec. Order No. 13,375, Apr. 1, 2005, 70 Fed. Reg. 17299 (Apr. 5, 2005). He has also delegated to the Secretary of Health and Human Services his authority to carry out duties under the statute. *Id.* See also 42 C.F.R. pts. 71 & 72.

67. See 42 US Code § 267(a): “[The Surgeon General] shall from time to time select suitable sites for and establish such additional . . . anchorages in the States and possessions of the United States as in his judgment are necessary to prevent the introduction of communicable diseases into the States and possessions of the United States.” “It shall be the duty of the customs officers and of Coast Guard officers to aid in the enforcement of quarantine rules and regulations . . . .” 42 US Code § 268(b).

68. “The exclusion of aliens is a fundamental act of sovereignty.” *Knauff v. Shaughnessy*, 338 U.S. 537, 542–43 (1950). In 1981, President Reagan ordered the Coast Guard to interdict vessels on the high seas where there was reason to believe the vessel was engaged in the transportation of illegal immigrants. Exec. Order No. 12,324, 46 Fed. Reg. 48,107, 48,109 (Sept. 29, 1981). President Bush issued similar guidance in 1992. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992). This policy remains in effect today. See Gary W. Palmer, *Guarding the Coast: Alien Migrant Interdiction Operations at Sea*, 29 CONNECTICUT LAW REVIEW 1565, 1569–72 (1997).

69. FAL Convention, *supra* note 35. The purpose of the FAL Convention is “to facilitate maritime traffic by simplifying and reducing to a minimum the formalities, documentary requirements and procedures on the arrival, stay and departure of ships engaged in international voyages.” *Id.* (Preamble).

70. See Rosalie Balkin, *The International Maritime Organization and Maritime Security*, 30 TULANE MARITIME LAW JOURNAL 1, 14 (2006) (noting that the 2002 amendments to the FAL Convention entered into force on May 1, 2003).

71. Information concerning IMO-recommended practices and forms for the FAL Convention is available at [http://www.imo.org/Conventions/contents.asp?topic\\_id=259&doc\\_id=684#4](http://www.imo.org/Conventions/contents.asp?topic_id=259&doc_id=684#4).

72. MCDOUGAL & BURKE, *supra* note 1, at 96 (footnote omitted). See also HAIJIANG YANG, JURISDICTION OF THE COASTAL STATE OVER FOREIGN MERCHANT SHIPS IN INTERNAL WATERS AND THE TERRITORIAL SEA 208–20 (2006).

73. 46 US Code §§ 8501–503. Compulsory pilotage requirements in internal waters are among the accepted rights of a port State. Glen Plant, *International Legal Aspects of Vessel Traffic Services*, 14 MARINE POLICY 71, 73 (1990).

74. “Except as otherwise provided in this subtitle, pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States” 46 US Code § 8501(a). Although the Constitution clearly gives Congress the power to regulate commerce with foreign nations, including regulating pilotage, Congress continues to let the individual States regulate most pilotage matters. See *Ray v. Atlantic Richfield Co.*, 535 U.S. 151, 159–60 (1978) (States may not impose pilotage requirements on “enrolled vessels” covered by federal laws, but “it is equally clear that they are free to impose pilotage requirements on registered vessels entering and leaving their ports . . . .”). But see 46 US Code §§ 9301–308 (a federal regulatory scheme governs

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pilotage on the Great Lakes), and 46 US Code § 8502 (requiring federally licensed pilots for vessels designated therein).

75. JEANETTE GREENFIELD, CHINA'S PRACTICES IN THE LAW OF THE SEA 32–33 (1992). Since 1979, the People's Republic of China has established an extensive set of regulations on port access both for security purposes and to foster international trade. Mark A. Hamilton, *Negotiating Port Access: The Sino-U.S. Opportunity for Leadership in the Maritime Transport Services Industry*, 3 ASIAN-PACIFIC LAW & POLICY JOURNAL 153, 155–56 (2002). For example, a vessel must request permission at least one week before the visit, must comply with a host of conditions on port access, must use the services of a pilot and must pay various port fees for services and customs. Failure to do so can result in denial of access, fines or even detention. GREENFIELD, *supra* at 31–34.

76. In the United States, the Ports and Waterways Safety Act provides authority for the Secretary of Homeland Security to establish a comprehensive program for vessel traffic services in US ports. 33 US Code §§ 1221–32. This includes provision for civil and criminal penalties, and authorizes the Captain of the Port to deny entry or withhold clearance to depart for vessels that fail to comply. *Id.* at § 1232. *See also* 33 C.F.R. § 160.1–160.111.

77. A total of some fourteen thousand vessels transit the Panama Canal each year, carrying over 203 million tons in cargo. *See* Panama Canal, ENCYCLOPEDIA BRITANNICA ONLINE (2007), <http://www.britannica.com/eb/article-9110730/Panama-Canal>.

78. *See* Houston Ship Channel, WIKIPEDIA, [http://en.wikipedia.org/wiki/Houston\\_Ship\\_Channel](http://en.wikipedia.org/wiki/Houston_Ship_Channel) (last visited Dec. 28, 2007).

79. *See* 33 US Code § 1223 (“Vessel operating requirements”); 33 C.F.R. §§ 164.11 (“Navigation underway: general”), 164.13 (“Navigation underway: tankers”).

80. The Transportation Safety Act of 1974 is the statutory framework for such regulations. 49 US Code §§ 5101–27. *See* 49 C.F.R. pt. 176 (“This part prescribes requirements . . . to be observed with respect to the transportation of hazardous materials by vessel.”)

81. *See* 33 US Code § 1228 (“Conditions for entry to ports in the United States”). *See also* RESTATEMENT *supra* note 2, § 512 cmt. c, rep. n. 4.

82. *See* 33 US Code § 1228(a)(1).

83. 1982 LOS Convention, *supra* note 8, art. 219 (the vessel will proceed for repairs before being permitted to leave).

84. *See* Sean Poltrack, *Maritime Industry and the Environment: The Delicate Balance of Economic and Environmental Concerns*, 8 UNIVERSITY OF BALTIMORE JOURNAL OF ENVIRONMENTAL LAW 51, 74–75 (2001–02) (“Vessel Safety Management”).

85. SOLAS Convention, *supra* note 29.

86. Titanic, ENCYCLOPEDIA BRITANNICA ONLINE (2007), <http://www.britannica.com/eb/article-9072642/Titanic>.

87. SOLAS Convention, *supra* note 29, ch. I, reg. 19(c) & ch. XI, reg. 4.

88. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, with Annex (STCW), July 7, 1978, S. Exec. Doc. EE 96-1, C.T.I.A. No. 7624, 1361 U.N.T.S. 190.

89. *See* [http://www.imo.org/Conventions/contents.asp?doc\\_id=651&topic\\_id=257](http://www.imo.org/Conventions/contents.asp?doc_id=651&topic_id=257) (providing details on the current status of the STCW Convention).

90. *See* 33 US Code § 1228 (“Conditions for entry to ports in the United States”).

91. 33 C.F.R. pt. 164 (“Navigational safety regulations”). *See, e.g.*, the proposal by the European Union to bar entry to its ports to ships that fail to comply with the SOLAS International Safety Management Code, which has since been incorporated into Chapter IX of SOLAS.

92. *See* COLOMBOS, *supra* note 4, § 181, at 177:

[E]ach State has the right to enact laws controlling navigation within its national waters. The entry of foreign merchant ships may thus be reasonably regulated provided no hindrance is put in the way of international trade and no discrimination made between States so as to favour some at the expense of others.

*Id.*

93. 46 US Code § 70114; 33 C.F.R. § 164.46 (“Automatic identification system”). AIS is defined as

a maritime navigation safety communications system standardized by the International Telecommunication Union (ITU) and adopted by the International Maritime Organization (IMO) that provides vessel information, including the vessel’s identity, type, position, course, speed, navigational status and other safety-related information automatically to appropriately equipped shore stations, other ships, and aircraft; receives automatically such information from similarly fitted ships; monitors and tracks ships; and exchanges data with shore-based facilities.

47 C.F.R. § 80.5.

94. J.M. Sollosi, *The Automated Identification System & Port Security*, PROCEEDINGS OF THE MARINE SAFETY COUNCIL, Apr.–May 2003, at 36, available at [http://www.uscg.mil/hq/g-m/nmc/pubs/proceed/newpromagpage2005/q2\\_03.pdf](http://www.uscg.mil/hq/g-m/nmc/pubs/proceed/newpromagpage2005/q2_03.pdf).

95. Brian Tetreault, *Automated Identification System: The Use of AIS in Support of Maritime Domain Awareness*, US COAST GUARD PROCEEDINGS, Fall 2006, at 27, 28–30.

96. Sollosi, *supra* note 94, at 38. “The AIS would contribute to this [Maritime Domain Awareness] mission by enabling the shore authority to track certain suspect vessels.” See also Alexandra Marks, *America’s Ship-Tracking Challenge*, CHRISTIAN SCIENCE MONITOR, Jan. 31, 2007, at 3, available at <http://www.csmonitor.com/2007/0131/p03s03-usgn.html>.

97. 33 C.F.R. § 164.41 (“Electronic position fixing devices”). The widespread availability of inexpensive and highly accurate Global Positioning System receivers, computers and communications systems linked to these devices should help make collisions and groundings a thing of the past.

98. 33 C.F.R. § 164.38 (“Automatic radar plotting aids (ARPA”)); see *id.*, app. B.

99. 46 C.F.R. § 184.502 (vessels required to comply with Federal Communications Commission requirements).

100. 33 C.F.R. § 160.212. After 9/11, the Coast Guard immediately acted to increase the advance NOA requirement from twenty-four to ninety-six hours. Temporary Requirements for Notification of Arrival in U.S. Ports, 66 Fed. Reg. 50,565, 50,566–68 (Oct. 4, 2001) (Chart I—Time for Submission) (codified at 33 C.F.R. pt. 160).

101. 33 C.F.R. at § 160.206 (Table 160.206). See J. Ashley Roach, *Container and Port Security: A Bilateral Perspective*, 18 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 341, 355–57 (2003) (“Advance Notice of Arrival”).

102. 33 C.F.R. § 160.206 (Table 160.206). The ISPS Code is a comprehensive set of measures that the IMO adopted in response to the threats to ships and port facilities in the wake of the 9/11 attacks on the United States. The ISPS Code requires ships and ports to develop and implement an approved security plan to prevent, among other things, terrorists hiring on as crew members and smuggling weapons, explosives and other such contraband into target ports. MTSA-ISPS Information Site, <http://www.uscg.mil/hq/g-m/mp/mtsa.shtml>.

103. 33 C.F.R. § 160.215. See also 46 C.F.R. subpt. 4-05 (notice requirement in case of a marine casualty).

104. See 33 US Code § 1228 (“Conditions for entry to ports in the United States”); 33 C.F.R. § 160.107 (“Denial of entry”).

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105. See Hartmut G. Hesse, *Maritime Security in a Multilateral Context: IMO Activities to Enhance Maritime Security*, 18 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 327, 332–33 (2003).

106. McDougall & Burke, *supra* note 1, at 94, 100–101, 114.

107. *Id.* at 102–103. See also Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels, 1931 P.C.I.J. (ser. A) No. 43, available at [http://www.worldcourts.com/pcij/eng/decisions/1931.12.11\\_danzig/](http://www.worldcourts.com/pcij/eng/decisions/1931.12.11_danzig/).

108. See, e.g., Treaty of Friendship, Commerce, and Navigation, US-Japan, art. XIX(7), *supra* note 30.

109. 1923 Convention and Statute on the International Régime of Maritime Ports, *supra* note 61, art. 13.

110. McDougall & Burke, *supra* note 1, at 100–103. “The coastal state ought to be accorded relatively complete discretion in deciding upon the permissibility of the entry of [warships into port].” *Id.* at 100.

111. “Before a warship enters a foreign port, it is generally required that her State or the naval officer in command should notify in advance the territorial State of her proposed visit. The number of warships belonging to the same Power which may remain at the same time in a foreign port and also the period of their stay is usually regulated by the territorial State.” COLOMBOS, *supra* note 4, § 274, at 262.

112. Japan Sets Sanctions on N. Korea to “Protect the Peace,” Associated Press, Oct. 11, 2006, <http://www.cnn.com/2006/WORLD/asiapcf/10/11/korea.nuclear.japan.ap/index.html//>. Indeed, it has been reported that “the Japanese delegation also proposed that North Korea’s ships . . . be turned away from [all] international ports.” Betsy Pisik, *China Hints Agreement on North Korea*, WASHINGTON TIMES, Oct. 11, 2006, at A01, available at <http://www.washingtontimes.com/world/20061011-120355-5512r.htm>.

113. Australia to Ban N. Korean Ships, BBC NEWS (ASIA-PACIFIC), Oct. 16, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/6054186.stm>.

114. NATIONAL STRATEGY FOR MARITIME SECURITY: MARITIME OPERATIONAL THREAT RESPONSE PLAN, App. B to Annex I (2006).

115. *Id.*, Annex I, at 2.

116. Orinoco Steamship Co. Case (US v. Venezuela), Venezuelan Arbitrations of 1903, at 72 (1904), 9 R.I.A.A. 180 (1904).

117. *Id.* at 95–96, 9 R.I.A.A. 203.

118. Exec. Order No. 10,173, §§ 6.04–5 and 6.04–8, 3 C.F.R. pts. 356, 357 (Oct. 18, 1950).

119. Canadian Transport Co. v. United States, 663 F.2d 1081, 1083–84 (D.C. Cir. 1980).

120. Canadian Transport Co. v. United States, 430 F. Supp. 1168, 1171 (D.D.C. 1977).

121. Canadian Transport Co., 663 F.2d at 1091.

122. ABT, *supra* note 59, at 2. See also William H. Parrish, *International Cooperation in Combating Terrorism*, 6 JOURNAL OF THE INSTITUTE OF JUSTICE & INTERNATIONAL STUDIES 51, 52–54 (2006) (reprint of Mr. Parrish’s presentation).

123. See Flynn, *supra* note 37, at 70–74.

124. Quoted in Terreri, *supra* note 38.

125. Al-Qaida Training Manual Shows Seaports Top Target, WORLD NET DAILY, Oct. 30, 2003, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=35327](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=35327) (Osama bin Laden’s terrorist network has focused on seaports as top-level targets for several years).

126. A World Wide Web of Nuclear Danger, ECONOMIST, Feb. 28, 2004, at 25.

127. In April 2004, the UN Security Council agreed on a resolution declaring that all member States were under an obligation to adopt and enforce laws making it illegal for non-State actors

to “manufacture, acquire, possess, develop, transfer, transport, or use nuclear, chemical, biological weapons and their means of delivery, in particular for terrorist purposes.” S.C. Res. 1540, UN Doc. S/Res/1540 (Apr. 28, 2004).

128. “Containment and traditional deterrence . . . are clearly no longer adequate to deal with the new world of terrorists armed with weapons of mass destruction.” *Binding the Colossus*, ECONOMIST, Nov. 22, 2003, at 25, available at <http://www.globalpolicy.org/empire/un/2003/1120colossus.htm>.

129. Note, however, the similar plot twist in Tom Clancy’s novel *Debt of Honor*, where the pilot of a Japan Airlines 747 intentionally crashes his aircraft into the Capitol building during a joint session of Congress, killing nearly everyone in the government except the newly named vice president, Jack Ryan.

130. Haveman et al., *supra* note 43, at 15–21. See also Flynn, *supra* note 37, at 60–74; STEPHEN E. FLYNN, THE EDGE OF DISASTER: REBUILDING A RESILIENT NATION (2007).

131. “The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security . . . [I]n an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.” THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> [hereinafter NATIONAL SECURITY STRATEGY].

132. See IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 701–702 (6th ed. 2003) (use of forces under the doctrine of preventive self-defense is problematic). See generally, Michael Byers, *Preemptive Self-Defense: Hegemony, Equality, and Strategies of Legal Change*, 11 JOURNAL OF POLITICAL PHILOSOPHY 171 (2003).

133. See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILLANOVA LAW REVIEW 699, 706–16 (2005) (discussion of four different schools of thought on the issue).

134. NATIONAL SECURITY STRATEGY, *supra* note 131, at 15.

135. See Firestone & Corbett, *supra* note 46, at 431–33; Haveman et al., *supra* note 43, at 15–21.

136. See 33 C.F.R. § 160.212.

137. See 33 C.F.R. § 160.210. Vessels may submit NOAs electronically on the NVMC website, available at <http://www.nvmc.uscg.gov/>.

138. 33 C.F.R. pt. 160. In addition, COTPs have broad authority under the Magnuson Act, 50 US Code §§ 191–98, and the Ports and Waterways Safety Act, 33 US Code §§ 1221–36, to issue orders and take actions to protect the security and safety of vessels and facilities within their areas of responsibility.

139. For a comprehensive analysis of various port security initiatives involving the Coast Guard, see Rachael B. Bralliar, *Protecting U.S. Ports with Layered Security Measures for Container Ships*, 185 MILITARY LAW REVIEW 1, 1–68 (2005).

140. President George W. Bush, Remarks by the President to the People of Poland, Wawel Royal Castle, Krakow, Poland (May 31, 2003), <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html>. The PSI concept envisions the interdiction of illicit cargoes in air and land-transportation modalities, but its greatest focus has been at sea. Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARVARD INTERNATIONAL LAW JOURNAL 131, 134 (2005).

141. Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 526, 527–28 (2004).

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142. Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counter-proliferation, and International Law*, 30 YALE JOURNAL OF INTERNATIONAL LAW 507, 508–09 (2005).

143. See Thomas Ricks & Peter Slevin, *Spain and U.S. Seize N. Korean Missiles*, WASHINGTON POST, Dec. 11, 2002, at A1.

144. Joyner, *supra* note 142, at 509.

145. Byers, *supra* note 141, at 527–28.

146. Press Release, Office of the Press Secretary, White House, Fact Sheet: Proliferation Security Initiative, Statement of Interdiction Principles (Sept. 4, 2003), <http://www.whitehouse.gov/news/releases/2003/09/print/20030904-11.html>.

147. *Id. See also* Ted L. McDorman, *An Information Note on the Proliferation Security Initiative (PSI)*, 36 OCEAN DEVELOPMENT & INTERNATIONAL LAW, Oct.–Dec. 2005, at 381, 381–86.

148. See Timothy C. Perry, *Blurring the Ocean Zones: The Effect of the Proliferation Security Initiative on the Customary International Law of the Sea*, 37 OCEAN DEVELOPMENT & INTERNATIONAL LAW, Jan.–Mar. 2006, at 33, 33–53; Joyner, *supra* note 142, at 509. *See also* Michael Evans, *US Plans to Seize Suspects at Will*, TIMES (London), July 11, 2003, at 23.

149. US Customs and Border Protection, New CSI Port Becomes Operational, U.S. CUSTOMS AND BORDER PROTECTION TODAY, May 2006, [http://www.cbp.gov/xp/CustomsToday/2006/may/new\\_csi\\_port.xml](http://www.cbp.gov/xp/CustomsToday/2006/may/new_csi_port.xml).

150. Press Release, Office of the Press Secretary, White House, Protecting America's Seaports and Security Cargo Shipments (Feb. 5, 2004), <http://www.whitehouse.gov/news/releases/2004/02/20040205-4.html> (CSI "allows [DHS] to prescreen cargo" before it reaches the United States). *See also* Jessica Romero, *Prevention of Maritime Terrorism: The Container Security Initiative*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 597, 597–605 (2003).

151. US Customs and Border Protection, Fact Sheet: Container Security Initiative, (Sept. 30, 2006), [http://www.cbp.gov/xp/cgov/border\\_security/international\\_activities/csi/csi\\_in\\_brief.xml](http://www.cbp.gov/xp/cgov/border_security/international_activities/csi/csi_in_brief.xml).

152. *Id. See* Roach, *supra* note 101, at 343.

153. No such US legal authority currently exists, and there are no serious proponents to adopt any such proposal. However, if Congress chose to impose such a requirement as a condition of port entry based on a reasoned national security justification, it would meet the requirements of international law.

154. *When Trade and Security Clash—Container Trade*, ECONOMIST, Apr. 6, 2002, at 69. (There are over 15 million containers in shipment at any one moment. Cargo shipped by container constitutes 90 percent of international trade by value).

155. *See* 6 US Code §§ 961–68. *See also* H. Lamar Walters III, *Industry on Alert: Legal and Economic Ramifications of the Homeland Security Act on Maritime Commerce*, 30 TULANE MARITIME LAW JOURNAL 311, 318–19 (2006) ("Customs-Trade Partnership Against Terrorism").

156. "The core technology is called a tamper-resistant embedded controller (TREC). It is attached to the cargo door of the container and can be programmed, unlike passive or active radio frequency identification tags. It can detect the opening of the container and can control a host of sensors located inside . . . All this transforms each container into an intelligent and mobile warehouse." Robert Malone, *The Container That Could*, FORBES.COM, Aug. 8, 2006, [http://www.forbes.com/2006/08/06/smart-shipping-containers-cx\\_rm\\_0808ship.html?partner=yahootix](http://www.forbes.com/2006/08/06/smart-shipping-containers-cx_rm_0808ship.html?partner=yahootix).

157. Larry Greenemeier, IBM Launches Wireless Shipping Security, INFORMATION WEEK, Sept. 20, 2005, <http://www.informationweek.com/showArticle.jhtml?articleID=171000325>. Of course, the early prototypes represent just the first generation of such devices. As more firms enter

the competition to develop such hardware and supporting software, improvements are sure to be forthcoming.

158. Lloyd's List, Freedom and Security: The Dilemma of Vessel Tracking, SECURITYWATCH.COM, Apr. 28, 2006, <http://www.securityinfowatch.com/article/article.jsp?id=7983&siteSection=386>.

159. *Id.*

160. See Erik Jaap Molenaar & Martin Tsamenyi, *Satellite-Based Vessel Monitoring Systems for Fisheries Management: International Legal Aspects*, 15 INTERNATIONAL JOURNAL OF MARITIME & COASTAL LAW 65, 67 (2000).

161. See 46 US Code § 2101; 33 C.F.R. § 164.46.

162. "Intelligence . . . is the first line of defense against terrorists . . . [and such] information becomes the basis for building MDA." US COAST GUARD, MARITIME STRATEGY FOR HOMELAND SECURITY 18 (2002).

163. Pub. L. No. 107-295, § 102(a), 116 Stat. 2082 (2002) (codified at 46 US Code § 70114).

164. Pub. L. No. 108-293, § 803(b), 118 Stat. 1080 (2004) (codified at 46 US Code § 70115).

165. Joe Pappalardo, *Federal Agencies Tackle Maritime Security, Ports First*, NATIONAL DEFENSE, June 2005, at 35, available at [http://www.nationaldefensemagazine.org/issues/2005/Jun/federal\\_agencies.htm](http://www.nationaldefensemagazine.org/issues/2005/Jun/federal_agencies.htm).

166. 46 US Code § 70114 ("Automated identification systems"); 46 US Code § 70115 ("Long-range vessel tracking system").

167. Aliya Sternstein, Coast Guard gets satellite help, FEDERAL COMPUTER WEEK.COM, Nov. 7, 2004, <http://www.fcw.com/article84497-11-07-04-Print>.

168. Res. MSC.202(81) and Res. MSC.210(81). See International Maritime Organization, Long range identification and tracking (LRIT), [http://www.imo.org/Safety/mainframe.asp?topic\\_id=905](http://www.imo.org/Safety/mainframe.asp?topic_id=905) (last visited Dec. 28, 2007).

169. Congress authorized the development and implementation of an LRIT system in 46 US Code § 70115, to be fully effective to provide "the capability of receiving information on vessel positions at interval positions appropriate to deter transportation security incidents" by April 1, 2007.

170. As an example, Australia's zone extends one thousand miles from its coast and involves the identification of vessels seeking to enter port, as well as vessels merely transiting Australia's EEZ. See Natalie Klein, *Legal Implications of Australia's Maritime Identification Zone*, 55 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 337, 337–68 (2006).

171. IMO Adopts Comprehensive Security Measures, IMO.org, [http://www.imo.org/About/mainframe.asp?topic\\_id=583&doc\\_id=2689](http://www.imo.org/About/mainframe.asp?topic_id=583&doc_id=2689) (last visited Dec. 28, 2007). See also Maritime Security, IMO.org, [http://www.imo.org/Safety/mainframe.asp?topic\\_id=55](http://www.imo.org/Safety/mainframe.asp?topic_id=55) (last visited Dec. 28, 2007).

172. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, § 102(a), Nov. 25, 2002, 116 Stat. 2079 (2002), as amended by Pub. L. No. 109-347, 120 Stat. 1918 (2006) (codified at 46 US Code § 70108) ("Foreign port assessment").

173. 46 US Code § 70110(a). The Secretary of the Department of Homeland Security (Coast Guard) is also charged with notifying the foreign country about security deficiencies it has observed at the port. *Id.* at § 70109(a).

174. 33 C.F.R. pt. 101 ("Maritime Security").

175. 33 C.F.R. § 101.410(b)(5) ("Denial of port entry").

176. 33 C.F.R. § 160.206 ("Information required in an NOA").

177. Michael Richardson, *Crimes Under Flags of Convenience: In a Depressed Shipping Market, Poor Nations Sell Flags for Criminal Ventures*, 127 MARITIME STUDIES, Nov.–Dec. 2002, at 22, 22–24.

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178. See 33 US Code § 1228(a)(2) (“Conditions for entry to ports in the United States”); 33 US Code § 1232(e) (“Denial of entry”).

179. 46 US Code § 70111(a) (“Enhanced crewmember identification”).

180. Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector, Proposed Rules, 71 Fed. Reg. 29,395 (May 22, 2006) (to be codified at 33 C.F.R. pts. 1, 20; 46 C.F.R. pts. 10, 12, 15; and 49 C.F.R. pts. 1515, 1570, 1572).

181. SAFE Port Act of 2006, Pub. L. No. 109-347, §§ 104, 106, 120 Stat. 1884, 1888–91 (2006) (codified at 46 US Code § 70105).

182. See 8 US Code § 1182 (“Inadmissible aliens” include persons with criminal records and/or terrorist affiliations).

183. Literally, the French phrase *force majeure* translates as a “greater or superior force.” It implies that the consequences were unanticipated and irresistible, such as an “Act of God.” BLACK’S LAW DICTIONARY 645 (6th ed. 1990). Although commonly applied in contract law, *id.*, the principle is well established in the law of the sea. “If a ship needs to enter a port or internal waters to shelter in order to preserve human life, international law gives it a right of entry.” CHURCHILL & LOWE, *supra* note 7, at 63. See also YANG, *supra* note 72, at 64–67.

184. According to one recent authority, “all writers agree” that vessels have a right to enter foreign ports in *bona fide* cases of *force majeure* and distress. La Fayette, *supra* note 6, at 11. A general right of access even extends to warships, where one is “obliged to take refuge in a foreign port by reason of stress of weather or other circumstances of *force majeure*.” COLOMBOS, *supra* note 4, § 274, at 262–63.

185. See 1982 LOS Convention, *supra* note 8, arts. 18 and 39.

186. *Id.*, art. 98 (“Duty to render assistance”). See also SOLAS Convention, *supra* note 29, Annex, ch. 5, regs. 10 & 15a; International Convention on Maritime Search and Rescue, Annex, ch. 2, ¶¶ 2.1.1, 2.1.4, 2.1.10, Apr. 27, 1979, T.I.A.S. No. 11,093, 1405 U.N.T.S. 97. See also 14 US Code § 88 (“Saving life and property” at sea is a statutory mission of the US Coast Guard).

187. COLOMBOS, *supra* note 4, § 353, at 329–30. See also MALANCZUK, *supra* note 2, at 175 (citing as examples ships seeking refuge from a storm or which are severely damaged).

188. See Kate A. Hoff (United States) v. Mexico, 4 R.I.A.A. 444 (1929).

189. PHILLIP C. JESSUP, THE LAWS OF TERRITORIAL WATERS AND MARITIME JURISDICTION 194 (1927). See also A.F. de Zayas, *Ships in Distress*, in 11 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 287–89 (Rudolf Bernhardt ed., 1989).

190. McDougal & Burke, *supra* note 1, at 110. See Christopher F. Murray, *Any Port in a Storm? The Right of Entry for Reasons of Force Majeure or Distress in the Wake of the Erika and the Castor*, 63 OHIO STATE LAW JOURNAL 1465, 1490–91 & n.159 (2002).

191. McDougal & Burke, *supra* note 1, at 110.

192. *Guangzhou Ocean Shipping Co. v. Minister of Transport, Public Works, and Water Management*, 27 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 354, 357 (1996).

193. See 1982 LOS Convention, *supra* note 8, art. 98 (“Duty to render assistance”); 46 US Code § 2304(a). See generally, Arthur A. Severance, *The Duty to Render Assistance in the Satellite Age*, 16 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 377, 378–93 (2005–06) (discussing the duty of masters, vessels and coastal States to render assistance to vessels and mariners in danger of being lost at sea).

194. Canadian Transport Co. v. United States, 663 F.2d 1081, 1083–84 (D.C. Cir. 1980).

195. *Id.* at 1091.

196. Humane Society of the United States v. Clinton, 44 F.Supp.2d 260 (Ct. Int’l Trade 1999).

197. High Seas Driftnet Fisheries Enforcement Act of 1992, Pub. L. No. 102-582, § 101, 106 Stat. 4900 (1992), (codified as amended at 16 US Code § 1826(a)).

198. Humane Society, 44 F.Supp.2d at 277–78 (to rule against the government, “the Court must find that [the Secretary of Commerce] acted arbitrarily, capriciously and not in accordance with law”).

199. Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340 (1972) (codified at 33 US Code §§ 1221–36).

200. 33 US Code § 1223(b)(1).

201. 33 C.F.R. § 160.107 (“Denial of entry”).

202. 33 C.F.R. § 160.111 (“Special orders apply to vessel operations”).

203. Admiral Thad Allen, Commandant, US Coast Guard, *The Water Is Different*, Address at the US Naval Institute Port Security Conference (June 7, 2006). “Significant progress has been made in the continuing maturation of the [MOTR] coordination process . . . .” A copy of the Commandant’s entire address is available at [http://www.uscg.mil/comdt/speeches/docs/USNI\\_NY\\_06\\_2006.pdf](http://www.uscg.mil/comdt/speeches/docs/USNI_NY_06_2006.pdf).

204. See RESTATEMENT, *supra* note 2, § 403(1).

205. 1982 LOS Convention, *supra* note 8, art. 22(3)(a).

206. *Id.*, art. 41(3). Moreover, any such proposals “shall conform to generally accepted international regulations.” *Id.*, art. 41(2).

207. *Id.*, art. 211(5). *See also id.*, art. 211(6).

208. FAL Convention, *supra* note 35, art. 1. *See* FAL Convention, 2002 Amendments, Jan. 10, 2002, 18 U.S.T. 411, 591 U.N.T.S. 265 (entered into force May 1, 2003).

209. For background on the proposal to regulate navigation in the Torres Strait and the legal issues involved, see Julian Roberts, *Compulsory Pilotage in International Straits: The Torres Strait PSSA Proposal*, 37 OCEAN DEVELOPMENT & INTERNATIONAL LAW 93, 94–104 (2006). Several maritime States objected to various aspects of this proposal. The United States, for example, filed a diplomatic protest that the Australian regulations violated international law to the extent that it impeded transit passage to vessels not bound directly for an Australian port. SECSTATE WASH DC message 091524Z Feb 07 (“Torres Strait Compulsory Pilotage: Third Demarche”). Noting that “the IMO has not approved a compulsory pilotage scheme for the Torres Strait . . . ,” the U.S. demarche contended that “there is no basis in international law” to impose such a mandatory scheme on “foreign flag ships exercising the right of transit passage.” *Id.*, ¶ 5.

210. Nairobi Convention on the Removal of Wrecks (May 18, 2007), IMO.org., [http://www.imo.org/Conventions/mainframe.asp?topic\\_id=1604](http://www.imo.org/Conventions/mainframe.asp?topic_id=1604).

211. Ted L. McDorman, *Regional Port State Control Agreements: Some Issues of International Law*, 5 OCEAN & COASTAL LAW JOURNAL 207, 219–22 (2000) (“Access to Ports—Effect of International Trade Laws”).

212. *Id.* at 222.



# III

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## Encroachment on Navigational Freedoms

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Raul (Pete) Pedrozo\*

### *Introduction*

I was asked to address the following four questions:

- Will there be increasing environmentally oriented measures adopted at the International Maritime Organization (IMO) that will encroach on navigational freedoms?
- Will there be increasing coastal State efforts to regulate military-related activities in the exclusive economic zone (EEZ), citing environmental concerns?
- Will excessive coastal State claims continue to proliferate driven primarily by resource needs?
- Will continental shelf disputes proliferate as nations attempt to make broad margin claims beyond 200 nautical miles (nm)?

I believe the unfortunate answer to all four of these questions is most definitely “yes,” and will cite a number of examples supporting my concerns.

### *IMO Environmental Measures*

My criticism of the IMO<sup>1</sup> in this article is not intended to disparage all the great work the IMO has done over the past five decades to improve safety at sea and

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\* Captain, JAGC, US Navy. The views expressed in this paper are those of the author and do not represent the official views of the United States government, the Department of Defense or United States Pacific Command.

protect the marine environment.<sup>2</sup> Conventions, such as the International Convention for the Safety of Life at Sea (SOLAS),<sup>3</sup> the International Convention for the Prevention of Pollution from Ships and its Protocol (MARPOL 73/78),<sup>4</sup> the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention)<sup>5</sup> and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers<sup>6</sup> have greatly enhanced safe, secure and efficient shipping, while at the same time protecting the marine environment from pollution from ships. However, since the 1990s a growing concern over marine pollution has put greater pressure on the IMO to adopt environmentally based routing measures that encroach on traditional freedoms of navigation guaranteed to all States by the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention).<sup>7</sup> That pressure, coupled with the IMO's focus on getting to "yes"—the IMO "spirit of cooperation"—has resulted in the unwillingness of member States to adequately scrutinize other States' proposals for fear that their own proposals may not be supported at a later date. In other words, "you scratch my back and I'll scratch yours." As a result, proposals have been adopted even though they fail to adequately demonstrate that international shipping poses a serious threat of damage to the area or that additional protective measures are truly necessary.

In 1995, SOLAS Chapter V was amended to add a new Regulation 11 that allows coastal States to implement compulsory ship reporting systems that are adopted by the IMO.<sup>8</sup> The new regulation entered into force on January 1, 1996. Since 1996, there has been a proliferation of mandatory ship reporting systems adopted by the IMO—a total of sixteen. All of the systems were justified, in part, by the coastal State citing the need to protect the marine environment. Although there was clearly a demonstrated need for some of these systems, others were adopted with only minimal scrutiny by the relevant IMO subcommittees and committees that reviewed the proposals.

In effect, mandatory ship reporting systems are nothing more than prior notice and consent regimes for ships transiting coastal State territorial seas and EEZs. Despite long-standing US policy regarding the invalidity of such regimes, the US delegation did not oppose the establishment of any of these systems. In fact, the United States had its own mandatory ship reporting system adopted by the IMO in 1998 to protect the northern right whale from the danger of collision with ships off the US East Coast. The reporting system, which was vehemently opposed by the US Department of Defense (DoD) in the interagency process, became operational in 1999.

There has similarly been a proliferation of IMO-approved particularly sensitive sea areas (PSSA). A PSSA is an area that needs special protection through action by

the IMO because of its significance for recognized ecological (unique or rare ecosystem, diversity of the ecosystem, or vulnerability to degradation by natural events or human activities) or socioeconomic (significance of the area for recreation or tourism) or scientific (biological research or historical value) reasons, and which may be vulnerable to damage by international maritime activities. Guidelines for designating PSSAs are contained in IMO Assembly Resolution A.982(24).<sup>9</sup> When an area is approved as a PSSA, associated protective measures are adopted to control maritime activities in the area. Such measures can include areas to be avoided (ATBA), mandatory ship reporting or mandatory ship routing systems, no anchorage areas, establishment of vessel traffic services and other IMO-approved routing measures.

The first PSSA—the Australian Great Barrier Reef—was designated in 1990. The Great Barrier Reef was clearly an area that warranted designation as a PSSA. However, since 1990 there has been a proliferation of PSSA designations. The ten additional PSSAs that have been designated since 1990 are Sabana-Camagüey Archipelago, Cuba (1997); Malpelo Island, Colombia (2002); Florida Keys, United States (2002); Wadden Sea, Denmark, Germany and the Netherlands (2002); Paracas National Reserve, Peru (2003); Western European Waters (2004); extension of the Great Barrier Reef PSSA to include the Torres Strait (2005); Canary Islands, Spain (2005); Galapagos archipelago, Ecuador (2005); and Baltic Sea Area, Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden (2005).

The Malpelo Island PSSA is a perfect example of how the IMO “spirit of cooperation” can lead to bad results. The Colombian proposal was initially justified on the need to curtail illegal fishing in and around Malpelo Island—clearly not an adequate basis for a PSSA designation under A.982(24). Although the proposal was initially rejected, “interested States” assisted Colombia in revising its proposal to meet the requirements of A.982(24). The proposal was resubmitted and approved by the IMO the next year.

I would be remiss if I did not take the opportunity at this juncture to say that the United States is its own worst enemy in this area. The United States has recently submitted a proposal to the IMO to designate the Northwestern Hawaiian Islands Marine National Monument as a PSSA. Again, this was done over strenuous DoD objection in the interagency review process. If adopted by the IMO, it will become the largest PSSA in history, encompassing over 140,000 square miles of ocean space. Even though the monument is already protected by six ATBAs that were adopted by the IMO in 1980, the United States is proposing expanding the ATBAs and adding a ship reporting system around the entire monument.<sup>10</sup> In my opinion, the US proposal fails to demonstrate that international shipping poses a threat of damage to the area, demonstrate that additional protective measures are

necessary, establish that the size of the area is commensurate with that necessary to address the identified need and address how these measures will be monitored and enforced.<sup>11</sup>

Another area of concern is the issue of compulsory pilotage in international straits. Previous efforts at the IMO to adopt such measures in straits used for international navigation have failed. However, on October 6, 2006, Australia implemented a compulsory pilotage scheme in the Torres Strait. Although the scheme is purportedly being implemented as a condition of port entry, failure to comply with the mandatory pilotage requirement can be enforced against ships transiting the strait the next time the ship enters an Australian port.<sup>12</sup> Several States, including the United States and Singapore, have filed diplomatic protests indicating that the regime is inconsistent with international law because it interferes with the right of transit passage through the strait. The United States, Singapore and other States maintain that the scheme is also inconsistent with the decision of the IMO Maritime Environment Protection Committee (MEPC) that adopted the measure. The MEPC resolution clearly states that it “recommends that Governments . . . inform ships flying their flag that they should act in accordance with Australia’s system of pilotage . . .”<sup>13</sup> Additionally, the intervention of the US delegation at the Fifty-Third Session of the MEPC stated that the MEPC resolution did not provide an “international legal basis for mandatory pilotage for ships in transit in this or any other strait used for international navigation.”<sup>14</sup> This statement was supported by several other delegations.<sup>15</sup>

Perhaps the following quote from a Danish delegate sums up how the IMO will balance environmental protection and navigational freedoms in the future: “The failure of the IMO to shift focus in order to adapt to international opinion and current international priorities that go beyond freedom of the oceans and embrace coastal state environmental interests is regrettable.”<sup>16</sup> I would suggest that this is not an isolated position. There are a number of nations, as well as some individuals within the US government, that think the same way.

### *Environmental Encroachment in the EEZ*

The EEZ is a creature of the 1982 LOS Convention and was created for the purpose of giving coastal States greater control over the resources adjacent to their coasts out to 200 nm.<sup>17</sup> Coastal States were also granted jurisdiction over artificial islands and structures, marine scientific research and protection of the environment in the EEZ.<sup>18</sup> Unfortunately, over the years, some coastal States have attempted to expand their influence in the EEZ by attempting to exercise control over non-resource-related activities, including many military activities. This

encompasses a large area of the ocean that a little over twenty years ago was considered to be high seas. This is particularly true in the Asia-Pacific region, where there are a number of overlapping 200 nm zones.<sup>19</sup>

The fact that some coastal States have attempted to impinge on traditional uses of the EEZ is of particular concern to the Department of Defense. Some recent examples of interference with US military activities in the EEZ based on, *inter alia*, resource-related and environmental concerns include Chinese challenges to a US military survey vessel in the Chinese-claimed EEZ, Indian challenge to a US military survey vessel in the Indian-claimed EEZ, Malaysian and Indonesian opposition at the Association of Southeast Asian Nations Regional Forum meeting in Manila to a proposal by Singapore to conduct a maritime security exercise in the Indonesian EEZ, Indonesian challenge to a US warship operating in the Indonesian EEZ, and Burmese and Indian interference with a US military aircraft in their respective flight information regions.

There are also regional efforts under way to establish guidelines for military activities in the EEZ that are clearly inconsistent with international law. The most recent example is the Nippon Foundation/Ocean Policy Research Foundation Guidelines, which were developed between 2002 and 2005 by a group of individuals acting in their personal capacities.<sup>20</sup> The purported need for these non-binding voluntary principles is that naval activities at sea are expanding at the same time that coastal States are attempting to exercise increasing control over their EEZs. These opposing trends, it is argued, will result in a higher frequency and intensity of incidents and guidelines are therefore necessary to de-conflict maritime and coastal State interests in the EEZ. Some of the principles outlined in the Nippon Foundation guidelines that have absolutely no basis in international law include:

- Military activities in the EEZ should not
  - stimulate or excite the defensive systems of a coastal State;
  - collect information to support the use of force against a coastal State;
- or
  - involve deployment of systems that prejudice the defense or security of a coastal State, or interfere with or endanger the right of the coastal State to protect and manage its resources and environment.
- Major military exercises in the EEZ should be prenotified to the coastal State and the coastal State should be invited to observe the exercise.
- Military exercises should be limited to the adjacent high seas.
- Military activities should not cause pollution or negatively affect the marine environment or marine living resources, including marine mammals.

- There should be no live fire of weapons, underwater explosions or creation of sound waves that may harm marine life or cause marine pollution.
- There should be no military activities in marine parks and marine protected areas.<sup>21</sup>

Although the Nippon Foundation guidelines are non-binding in nature, they should be of great concern to all maritime nations.

### *Excessive Claims Driven by Resource Needs*

There are a number of island disputes and excessive maritime claims in the Asia-Pacific region that are driven, in part, by resource needs. The fact that China and Japan are involved in many of these disputes is understandable when one recognizes that China is the world's second-largest energy consumer and Japan is the fourth (and the world's second-largest energy importer).

Some of the more prominent island disputes include<sup>22</sup>

- Liancourt (Takeshima/Dokdo) Rocks (Japan and Republic of Korea (ROK)),
- Senkaku/Diaoyu Islands (Japan, China and Taiwan),
- Spratly Islands (China, Taiwan, Vietnam, the Philippines, Malaysia and Brunei),
- Paracel Islands (China, Taiwan and Vietnam),
- Kuril Islands (Russia and Japan) and
- Natuna Islands (Indonesia and China).

Liancourt Rocks (Takeshima/Dokdo) are claimed by both Japan and the Republic of Korea. The ROK has occupied the rocks, located 87.4 kilometers (km) from Ulleungdo Island (ROK) and 157.5 km from the Oki Islands (Japan), since 1954 and maintains a police station, lighthouse and helicopter pad. The rocks are surrounded by rich fishing grounds and potential mineral resources. The ROK maintains that the EEZ median line should be between Ulleungdo and the Oki Islands. Japan maintains that the median line should be between the Liancourt Rocks and Ulleungdo Island. Talks between the two governments have been ongoing since 1996, with four rounds between 1996 and 2000, and two rounds in 2006. To date, no resolution has been reached and the ROK has refused third-party intervention (e.g., International Court of Justice, International Tribunal for the Law of the Sea, etc.).

The Senkaku (Japan)/Diaoyu (China) Islands are claimed by China, Japan and Taiwan. The islands, located about 120 nm northeast of Taiwan, lie astride key

shipping routes and oil reserves and have been the source of a century-old dispute. Currently, the issue is linked to the ongoing EEZ and continental shelf dispute between China and Japan. The continental shelf dispute is over delimitation principles; China claims natural prolongation, while Japan claims equidistance and has proposed a median line as the demarcation line for the respective EEZs and continental shelves. The Shirakaba oil field straddles Japan's proposed median line.

China began oil and gas development west of the proposed median line in the 1980s. However, with China's development of the Shirakaba oil field, the EEZ dispute has become more prominent. Additionally, when Japan promulgated its law on the EEZ and continental shelf in 1996 to include the Senkakus/Diaoyus, incursions by Chinese oil exploration vessels, warships and ocean research vessels into Japan's claimed EEZ around the Senkaku/Diaoyu Islands increased. Bilateral talks between the two countries have been on-again, off-again since 2004, with three unsuccessful rounds in 2005. Talks resumed in 2006, but again failed to reach a resolution. In the short term, Japan wants China to stop drilling and has proposed a joint project. China has rejected Japan's demands to suspend exploration, indicating that it is developing resources in an area that is not in dispute.

The Spratly Islands consist of well over one hundred islands, cays, reefs and shoals scattered over an ocean area of nearly five hundred thousand square miles in the center of the South China Sea.<sup>23</sup> Although most of the islets that make up the Spratlys are uninhabitable, they lie astride some of the most important and busiest maritime routes in the world. The waters surrounding the Spratlys are also potentially rich in hydrocarbon and mineral deposits, and contain some of the region's most abundant fishing grounds. Since 1950, the South China Sea has been one of the world's most productive offshore oil- and gas-producing areas. Over thirty oil and natural gas fields have been developed in the region by the various littoral States.<sup>24</sup>

The Spratlys are claimed in their entirety by China, Taiwan and Vietnam and in part by Brunei, Malaysia and the Philippines.<sup>25</sup> At least forty-three of the fifty-one major islets in the Spratlys are occupied by five of the six claimants.<sup>26</sup> Each claimant has offered separate justifications for its claim, including historic title, discovery, occupation, maritime law, and proximity and indispensable need.<sup>27</sup> The historical claims of China and Taiwan are the most substantive in terms of abundance and time. However, neither claimant has exercised effective, continuous and undisputed peaceful control over the entire region. Only Japan has effectively, albeit temporarily, occupied the disputed islands, from 1939 until its defeat in 1945. However, following World War II, Japan was forced to renounce its claims to the Spratlys and the Paracels in the San Francisco Treaty of Peace (1951). Unfortunately, a successor sovereign was not designated in the treaty.<sup>28</sup>

Similarly, the Paracel Islands lie astride rich fishing grounds and potential oil and gas deposits. The islands are claimed by China, Taiwan and Vietnam, and have been occupied by China since 1974 when Chinese military forces expelled the South Vietnamese garrison from the islands. Vietnam, however, has not abandoned its claim, reaffirming its position on April 11, 2007.<sup>29</sup>

The Kuril Islands have been the source of a dispute between Russia and Japan since the end of World War II. Prior to the war, Japan occupied the southern portion of Sakhalin Island and all of the Kuril Islands from Hokkaido to the Kamchatka Peninsula. Following Japan's defeat in 1945, Russia occupied all of Sakhalin Island and all of the Kurils down to Hokkaido. Japanese fishermen, however, have continued to fish in Russian-claimed waters around the islands. In August 2006, a Japanese fisherman was killed after a Russian border patrol boat fired on a Japanese fishing vessel in disputed waters north of Hokkaido. The boat was seized and its three surviving crew members were taken to Kunashir Island, one of the Northern Territory islands controlled by Russia.<sup>30</sup>

Global warming and the world's insatiable appetite for more resources have brought a renewed focus on the Arctic. The thawing of the polar ice is opening the Arctic, creating access to new shipping routes, creating new fishing grounds, providing new tourism opportunities, and allowing exploitation of new oil and gas fields. A recent US Geological Survey report concluded that 25 percent of the world's energy reserves lie north of the Arctic Circle.<sup>31</sup> Record energy prices, coupled with the melting ice cap, are therefore creating renewed interests in projects that had not been considered cost-effective.

This increased attention on Arctic resources has brought several territorial disputes to the forefront, including a disagreement between Russia and Norway over the Barents Sea, a disagreement between Russia and the United States over the Bering Sea, a disagreement between Canada and Denmark over Hans Island, and a disagreement between Canada and the United States over the Beaufort Sea. As Arctic oil and gas become more readily available, it is likely that the territorial claims and tension between the various claimants will increase.

The Bering Sea is home to the oil-rich Navarin Basin and is rich in pollock, salmon, halibut and crab. It yields nearly 50 percent of the US seafood catch and nearly one-third of Russia's seafood catch. Fishing opportunities will increase as sea ice cover begins later and ends sooner in the year as a result of global warming. There have been ongoing discussions between the United States and Russia since 1981 in an effort to agree on a maritime boundary. The issue was apparently resolved on June 1, 1990 when the United States and Russia signed a maritime boundary agreement. The agreement was submitted to the US Senate for advice and consent and to the Russian Duma for ratification. However, before the Duma

could act, the Soviet Union collapsed. Russian officials now say that the proposed boundary agreement gives the United States too much of the Bering Sea's fish stocks. The Russians want to use the rhumb line (as opposed to the great circle path) as the boundary. The difference in area using the rhumb line or the great circle path is over twenty-thousand square miles.<sup>32</sup>

The Beaufort Sea also contains significant energy resources. Although it is currently frozen year-round, increasing temperatures are expected to open the Beaufort Sea to oil and gas exploration (and increased fishing) in the future. The Beaufort Sea is claimed by both the United States and Canada.

### *Continental Shelf Disputes*

As discussed above, the Arctic contains an estimated 25 percent of the world's energy reserves. Competing continental shelf claims exist among Denmark, Canada, United States, Russia and Norway. The Russian submission to the Continental Shelf Commission, for example, claimed nearly half of the Arctic Ocean. The Russian claim clearly overlaps portions of the Arctic that the United States could claim. In August 2006, the Canadian Prime Minister announced a series of measures to secure Canada's sovereignty claims in the Arctic, including plans to construct a deepwater port for submarines on Baffin Island near Iqaluit; build three military icebreakers; install underwater sensors in Arctic waters to detect foreign submarines; and station unmanned aerial vehicles and more aircraft in Yellowknife to carry out regular surveillance of the northern region.<sup>33</sup>

The Arctic is not the only place where we see continental shelf disputes brewing. For example, encroachment by India and Burma (i.e., surveys and overlapping gas blocks in the Bay of Bengal) on the Bangladeshi continental shelf has created great concern in the Bangladesh Ministry of Defense. The Foreign Minister has been quoted as saying that no one will be allowed to explore hydrocarbon within Bangladesh's EEZ without permission.<sup>34</sup>

### *Conclusion*

Military organizations need to do a better job both domestically and at the IMO to ensure proposed measures are really necessary to address the stated environmental and safety of navigation threats and concerns. The focus must be on protecting military equities by ensuring that proposals are consistent with the 1982 LOS Convention and that the balance between coastal State and user State interests is properly maintained.

In order to preserve operational and training flexibility, militaries must continue to operate in foreign EEZs without coastal State notice or consent. Conducting lawful military activities in foreign EEZs avoids adverse precedents and preserves navigational rights and freedoms for all ships and aircraft.

It is inevitable that resource needs will result in excessive coastal State claims and increasing confrontations at sea. The same is true for continental shelf disputes among the broad-margin States in the Arctic and elsewhere. Although the underlying territorial or maritime boundary disputes may not be resolvable in the near term, joint development may provide a short-term solution that defuses tensions and allows for peaceful exploitation of resources.

### **Notes**

1. The author served as the DoD representative to the US delegation to the IMO from 1995 to 2001. He was a member of the US delegation to numerous meetings of the IMO Assembly, Maritime Safety Committee, Legal Committee, Facilitation Committee, Sub-committee on Safety of Navigation and the Sub-committee on Dangerous Goods, Solid Cargoes and Containers. He also served as the Chairman of the IMO Working Group that drafted the IMO Guidelines for the Suppression of Illegal Transport of Migrants by Sea.

2. Convention on the Intergovernmental Maritime Consultative Organization, Mar. 6, 1948, 9 U.S.T. 621, T.I.A.S. 4044, 289 U.N.T.S. 48. The Convention entered into force in 1958. The IMO first met in 1959. The organization was originally called the Intergovernmental Maritime Consultative Organization (IMCO), but changed its name in 1982 to the IMO.

3. International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T 47, 164 U.N.T.S. 113, *available at* [http://www.imo.org/Conventions/contents.asp?topic\\_id=257&doc\\_id=647](http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647).

4. Nov. 2, 1973, 1313 U.N.T.S. 3. The Convention was modified by the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 1340 U.N.T.S. 184. The MARPOL Convention is the main international convention governing the prevention of pollution of the marine environment by vessel operations or vessel accidents. It consists of two treaties adopted in 1973 and 1978 and has been updated by amendments through the years. *See* International Convention for the Prevention of Pollution from Ships, [http://www.imo.org/conventions/contents.asp?doc.id=678&topic\\_id=258](http://www.imo.org/conventions/contents.asp?doc.id=678&topic_id=258) (last visited Feb. 7, 2008).

5. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120.

6. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, July 7, 1978, *available at* [http://www.imo.org/conventions/contents.asp?doc\\_id=651&topic\\_id=257](http://www.imo.org/conventions/contents.asp?doc_id=651&topic_id=257).

7. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter 1982 LOS Convention].

8. A similar amendment was made in 1996, adding a new Regulation 10 which allows for coastal States to implement compulsory ship routing systems adopted by the IMO. The new regulation entered into force on January 1, 1997 and allows coastal States to channelize maritime

traffic based on cargo or category of ship. Since 1997, three mandatory ship routing systems have been adopted by the IMO.

9. Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, IMO Assembly Resolution A.982, 24th Session, Agenda Item 11, *available at* [http://www.imo.org/includes/blastDataOnly.asp?data\\_id%3D14373/982.pdf](http://www.imo.org/includes/blastDataOnly.asp?data_id%3D14373/982.pdf).

10. The ship reporting system will be mandatory for ships bound for US ports and recommended for ships not bound for US ports.

11. Neither the US Coast Guard nor the National Oceanic and Atmospheric Administration have the assets to monitor and enforce the proposed PSSA.

12. A fine of up to one hundred thousand Australian dollars can be imposed for failure to take on a pilot. [Australian Government] Marine Notice 8/2006 (May 16, 2006), as amended by Marine Notice 16/2006 (Oct. 3, 2006), *available at* [http://www.amsa.gov.au/Shipping\\_Safety/Marine\\_Notices/2006/Marine\\_Note\\_16-2006.asp](http://www.amsa.gov.au/Shipping_Safety/Marine_Notices/2006/Marine_Note_16-2006.asp).

13. Designation of the Torres Strait as an Extension of the Great Barrier Reef Particularly Sensitive Sea Area, IMO Resolution MEPC.133(53), July 22, 2005, para. 3, *available at* [http://www.imo.org/includes/blastDataOnly.asp?data\\_id%3D18030/133%2853%29.pdf](http://www.imo.org/includes/blastDataOnly.asp?data_id%3D18030/133%2853%29.pdf).

14. MEPC 53 Delegation Report, Report of the IMO Marine Environment Protection Committee (MEPC), London, 53rd Session para. 3A, July 18–22, 2005, *available at* [http://www.uscg.mil/hq/g-m/mso/docs/MEPC53\\_report\\_cable.doc](http://www.uscg.mil/hq/g-m/mso/docs/MEPC53_report_cable.doc).

15. *Id.*

16. Author's notes taken at a meeting of the MEPC.

17. 1982 LOS Convention, *supra* note 7, Part V.

18. *Id.*, art. 56.

19. In the Asia-Pacific region, there are nine nations that assert excessive coastal State jurisdiction in their EEZs: India, Indonesia, Malaysia, China, Burma, Bangladesh, North Korea, Maldives and Mauritius. See UNDER SECRETARY OF DEFENSE FOR POLICY, MARITIME CLAIMS REFERENCE MANUAL, DoD 2005.1-M, June 23, 2005, <http://www.dtic.mil/whs/directives/corres/html/20051m.htm>.

20. EEZ GROUP 21, OCEAN POLICY RESEARCH FOUNDATION, GUIDELINES FOR NAVIGATION AND OVERFLIGHT IN THE EXCLUSIVE ECONOMIC ZONE, Sept. 16, 2005, *available at* <http://www.sof.or.jp/en/report/index.php#0509>; then follow Guidelines for Navigation and Overflight in the Exclusive Economic Zone hyperlink.

21. That begs the question—what about military activities and exercises in a PSSA? Remember, the Northwestern Hawaiian Islands PSSA, if adopted by the IMO, will encompass over 140,000 square miles of ocean space.

22. The United States does not take a position on the question of the ultimate sovereignty of any of these islands, but expects that the claimants will resolve their differences through peaceful means.

23. Richard D. Fisher Jr., *Brewing Conflict in the South China Sea*, THE HERITAGE FOUNDATION ASIAN STUDIES CENTER, Oct. 25, 1984, at 3, *available at* [http://www.heritage.org/Research/AsiaandthePacific/upload/90517\\_1.pdf](http://www.heritage.org/Research/AsiaandthePacific/upload/90517_1.pdf). The Spratly archipelago encompasses nearly 38 percent of the waters of the South China Sea. THE PHILIPPINES AND THE SOUTH CHINA SEA ISLANDS: OVERVIEW AND DOCUMENTS 8 (Neil F. R. Ferrer ed., 1993) [hereinafter OVERVIEW AND DOCUMENTS].

24. Zhiguo Gao, *The South China Sea: From Conflict to Cooperation?*, 25 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 345 (1994).

## *Encroachment on Navigational Freedoms*

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25. Brunei only claims a fishing zone in the southern reef. Omar Saleem, *The Spratly Islands Dispute: China Defines the New Millennium*, 15 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 527, 576 (2000).
26. China (6), Malaysia (3), Philippines (8), Taiwan (1) and Vietnam (25). Gao, *supra* note 24, at 347.
27. OVERVIEW AND DOCUMENTS, *supra* note 23, at 20.
28. *Id.*
29. *Vietnam claims sovereignty over Paracel, Spratly Islands*, ORGAN OF THE MILITARY CENTRAL COMMISSION AND VIETNAMESE MINISTRY OF NATIONAL DEFENSE, April 12, 2007, <http://www.qdnd.vn/army/vietnam.Policy-Society.pnews.5605.qdnd>.
30. Richard Lloyd Parry, *Fisherman shot dead for sake of a haul of crab in islands dispute*, TIMES (London), Aug. 17, 2006, at 31, available at <http://www.timesonline.co.uk/tol/news/world/asia/article611347.ece>.
31. US Geological Survey Fact Sheet, Assessment of Undiscovered Oil and Gas Resources of the East Greenland Rift Basins Province, Aug. 2007, available at [http://pubs.usgs.gov/fs/2007/3077/pdf/FS07-3077\\_508.pdf](http://pubs.usgs.gov/fs/2007/3077/pdf/FS07-3077_508.pdf).
32. For a history of the boundary dispute with Russia and the negotiation of the 1990 maritime boundary agreement, see John H. McNeill, *America's Maritime Boundary with the Soviet Union*, NAVAL WAR COLLEGE REVIEW, Summer 1991, at 46, reprinted in READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1973-1994, at 219 (John Norton Moore & Robert F. Turner eds., 1995) (Vol. 68, US Naval War College International Law Studies).
33. The measures announced by Prime Minister Harper were those contained in the "Canada First" defense plan of the Conservative Party during the 2005/2006 election campaign. For the details of the measures, see Dianne DeMille & Stephen Priestley, *Stephen Harper announces the new defence policy put forward by the Conservative Party of Canada*, CANADIAN AMERICAN STRATEGIC REVIEW, Dec. 2005, <http://www.sfu.ca/casr/ft-harper1-1.htm>.
34. *Dhaka won't allow anyone to explore hydrocarbon within its maritime boundary*, SHWE GAS MOVEMENT, May 16, 2006, <http://www.shwe.org/docs/dhaka-won-t-allow-anyone-to-explore-hydrocarbon-within-its-maritime-boundary>.

# IV

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## China and the Law of the Sea: An Update

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Guifang Xue\*

### *Introduction*

This article examines the practice of the People's Republic of China with respect to the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention).<sup>1</sup> Two principal areas will be assessed: China's efforts to accommodate the challenges of the Convention to its ocean domain as a coastal State and its major maritime legislation to implement the Convention regime. The analysis begins with a brief introduction of China's maritime features and a review of its basic stance toward the Convention. This is followed by a discussion of the major challenges China encountered while establishing its ocean domain based on the Convention regime. China's efforts in implementing the 1982 LOS Convention through national legislation are examined to assess the consistency of that statutory framework with Convention requirements. Finally, conclusions are drawn from China's law of the sea practice. It is shown that China, for its part, has been accelerating domestic procedures with a view to enabling it to comply with Convention requirements. However, China's maritime practice has not been wholly consistent with Convention provisions. At the same time, China's oceans policy adjustments indicate a move away from its previous position as solely a coastal

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State to that of a maritime State. To that end, China needs to set priorities to improve its overall management capacity and to bring its maritime practice into alignment with the requirements of the 1982 LOS Convention.

### ***China’s Maritime Features and Basic Stance on the 1982 LOS Convention***

China is situated in the eastern part of the Asian continent with a land territory of 9.6 million square kilometers, which ranks it as the third-largest State in the world. As a developing country with a population of 1.3 billion, China faces an enormous task to feed more than one quarter of the world’s population on 7 percent of the world’s arable land. China’s overriding national policies call for economic expansion to meet the basic and growing needs of its huge population. In the last two decades, China has experienced tremendous economic growth, but the limited terrestrial resources hinder its further development. With a soaring increase in population and gradual reduction of land resources, China has turned to the ocean for marine resources to ease the pressure on insufficient land-based resources.

From north to south, China borders an internal sea—the Bohai Sea—and three semi-enclosed seas—the Yellow Sea, the East China Sea, and the South China Sea (hereinafter called the China Seas).<sup>2</sup> China has a coastline of more than eighteen thousand kilometers, more than 6,500 offshore islands and an island coastline of over fourteen thousand kilometers. In the early 1990s, China embarked on a “Blue Revolution” to develop the “Blue Economy,” and this practice has continued into this century. China has eleven coastal provinces and municipalities that cover an area of 1.3 million square kilometers, account for 14 percent of the country’s land-mass in total, but support 44.7 percent of its population and generate 60 percent of the nation’s gross domestic product.

As a land power, China did not focus as much attention as it should have on the sea or sea power. In its long history, the foreign invasions China suffered came mostly from the sea. Those bitter experiences made maritime security issues its major concern.<sup>3</sup> Its participation in the Third United Nations Conference on the Law of the Sea (UNCLOS III) and the maritime practices of its neighbors kindled China’s interest in the seas.<sup>4</sup> In UNCLOS III, China made its first contribution to the creation of a new international convention—the 1982 LOS Convention.

China signed the 1982 LOS Convention on December 10, 1982, the very day it was opened for signature, and was eager to enjoy the maritime rights and interests attached to the new regime.<sup>5</sup> However, as a coastal State bordering three semi-enclosed seas, China found itself disadvantaged in embracing the full entitlement under the Convention. It had to deal with overlapping boundaries with its neighbors opposite or adjacent to its own coast and within four hundred nautical miles (nm).

In contrast to the worldwide acceptance of the Convention's exclusive economic zone (EEZ) regime, China hesitated to implement it.<sup>6</sup> Overall, China considers the conclusion of the 1982 LOS Convention a concrete step toward the establishment of a new international legal order for the oceans, and is interested in both the legal and economic aspects of the Convention, as well as the political implications the Convention is bringing about.<sup>7</sup> On the other hand, China is not satisfied with those articles of the Convention pertaining to innocent passage, the definition of the continental shelf, boundary delimitation of the EEZ and continental shelf, and the international deep seabed regime.

After years of debating the advantages and disadvantages, China ratified the Convention in May 1996 and established its EEZ at the same time. The ratification makes it possible for China to claim its sovereign rights and jurisdiction over three million square kilometers of maritime space to which it is entitled under the 1982 LOS Convention. It provides China with a vital opportunity to develop its "Blue Economy," the best way to secure its national interests and the impetus to consolidate its links with the world. The Convention also enabled China to take part in global marine affairs and, more importantly, to pursue a sustainable development strategy consistent with that universal instrument. However, while implementing the Convention regime, China has encountered a series of challenges.

### ***1982 LOS Convention Challenges Encountered by China***

Since the 1982 LOS Convention was signed, the EEZ concept has been firmly established in customary international law. By the time the Convention finally came into force in 1994, more and more States had started to define the limits of their maritime zones and had started negotiations to settle maritime boundary disputes with their neighbors. This is also the case with the China Seas, where all the coastal States bordering those seas have made unilateral assertions of jurisdiction over extensive areas of offshore waters, including full 200-nm EEZ claims.<sup>8</sup> However, nowhere in the Yellow Sea does the distance between opposing coastlines reach 400 nm. Most of the East China Sea is less than 400 nm in width. Any unilateral claim of a full EEZ or continental shelf would create substantial overlaps.

China is adjacent or opposite to eight neighboring countries surrounding the China Seas (the two Koreas, Japan, Vietnam, Malaysia, the Philippines, Brunei Darussalam and Indonesia).<sup>9</sup> These States vary greatly in size, geographical configuration, social and cultural structures, and economic and political systems, but many of them have contested sovereignty claims or sovereign rights to different parts of the seas, particularly some islands of the South China Sea.<sup>10</sup> The semi-enclosed seas surrounding these States provide not only distinctive ecosystems and

abundant resources, but also a unique social and political environment. The geographical proximity and the confluence of myriad social and political factors, including historical legacy, different social systems and ideology, and international politics, have made the relationships among the China Seas' States complex over the last century.<sup>11</sup>

The situation is further complicated by disputes over the ownership of some uninhabited islands and the boundary delimitation of the continental shelf.<sup>12</sup> Of the disputed island claims concerning China, the status of the Xisha (Paracel) Islands and the Nansha (Spratly) Islands have been the most serious and have resulted in several clashes involving military action between China and Vietnam.<sup>13</sup> China also has maritime disputes regarding the ownership of the Diaoyu/Senkaku Islands with Japan; these show no sign of settlement in the near future. These disputes concern sovereignty over offshore islands that are valuable to the owners because of their locations, rather than their physical usefulness. The State that successfully establishes ownership of the islands gains enormous jurisdictional rights over the surrounding seas by establishing an EEZ.

Prompted by the problems of boundary delimitation with its maritime neighbors, China has shown a keen interest in continental shelf issues, as they involve China's vital interests. China's fundamental position is that the continental shelf is the natural prolongation of the coastal State, which defines, according to its specific geographical conditions, the limits of that portion of the continental shelf extending beyond its territorial sea or EEZ that is under its exclusive jurisdiction. The maximum limits of such a continental shelf may be determined among States through consultations. The progress, however, has been extremely slow due to the different principles the concerned parties employ for the delimitation, as well as the geophysical nature of the seabed at issue.<sup>14</sup> South Korea argues for the median line in the Yellow Sea and part of the East China Sea, but relies on the doctrine of natural prolongation in the northeastern part of the East China Sea because in that area the continental shelf extends 200 nm beyond the baseline of its territorial sea. Carrying on with the doctrine of natural prolongation, China maintains that the Okinawa Trough is a natural boundary between itself and Japan. Understandably, Japan has denied this characteristic and insisted on the application of the equidistance principle.

In addition to the dispute over the ownership of islands and overlapping claims over maritime zones, China also has to deal with the competing interests over natural resources, living and non-living, with some of its neighboring States, particularly Japan, Korea and Vietnam. Prospects for resolution of these issues are limited due to their profound impact and critical consequence, plus the political relationship among these States. Over the years China has made a number of efforts to address disputes with its maritime neighbors, but these overtures have led to the

conclusion of only a few bilateral agreements (mainly pertaining to the settlement of fisheries conflicts), e.g., those with Japan, South Korea and Vietnam. However, the situation in the South China Sea has not changed much. The intensified competition for fisheries resources has even resulted in clashes between fishermen themselves, and between fishermen of one State and maritime forces of another.<sup>15</sup> These clashes have often resulted in the loss of property and life.<sup>16</sup> As a consequence, the South China Sea has become a site of tension and potential conflict. This has made access to those waters somewhat dangerous and problematic.

Besides a host of maritime challenges, the South China Sea has also been an important consideration for China's defense and security.<sup>17</sup> The South China Sea is of strategic importance to China, not only owing to its resources, but also for its location and value for transportation. In addition to a distinct ecosystem and rich natural resources, such as oil and gas, the South China Sea is one of the world's busiest international sea lanes. It serves as a maritime superhighway with more than half of the world's supertanker traffic and over half of the world's merchant fleet passing through those waters every year.<sup>18</sup> As the largest State bordering the South China Sea, China is relying more and more heavily on this superhighway for its energy supply and international trade. China is playing an increasingly important role in the evolution of maritime behavior in the South China Sea. Examples include China's participation in the Regional Code of Conduct in the South China Sea adopted by the member States of the Association of Southeast Asian Nations and China in November 1999.<sup>19</sup> The driving force for China's proactive attitude in regional affairs is, on one hand, to resolve its long-standing disputes with its maritime neighbors, and to secure its interests in the South China Sea on the other. It may also be expected that China's positive attitude will bring its management practices in line with international requirements and contribute to regional cooperation.

Compared with its maritime neighbors, China is disadvantaged in the use of the China Seas. Although China claims three million square kilometers of "blue territory" under the 1982 LOS Convention, the ratio of land to ocean space is smaller than those of its maritime neighbors. China has engaged in negotiations to settle maritime boundary disputes with its neighboring States. When dealing with these issues, China has shown little interest in using international adjudication and appears to favor consultation, thereby minimizing the necessity of multilateral involvement. Predictably, China will eventually settle these disputes by its own means. However, in situations where there is a dispute between two States as to the interpretation or application of the LOS Convention, the compulsory dispute settlement mechanism set out in Part XV is available.

### *China's Implementation of the 1982 LOS Convention*

Ratification of the 1982 LOS Convention has had a strong impact on China's maritime legislation and practice. China's commitment to the Convention's obligations is evidenced by national legislation on maritime zones. Among the maritime zones under national jurisdiction provided for in the Convention, China has declared a 12-nm territorial sea (with straight baselines), a 24-nm contiguous zone, a 200-nm EEZ and a continental shelf. China formally promulgated the Law of the PRC [People's Republic of China] on the Territorial Sea and the Contiguous Zone in 1992 (1992 TS/CZ Law), and the Law of the PRC on the Exclusive Economic Zone and the Continental Shelf in 1998 (1998 EEZ/CS Law).<sup>20</sup> As the most important pieces of national maritime legislation, the two laws are fundamental and decisive in their legal status and direct impact on China's LOS Convention practice, and merit a discussion.

#### **China's Law and Policy on the Territorial Seas**

Much of China's early law of the sea practice was found in specific laws and regulations concerning control and jurisdiction over foreign vessels in Chinese waters, in a number of treaties on commerce and navigation, or in bilateral agreements concluded with neighboring States. China's first national action regarding the territorial sea was the Declaration of the Government of the People's Republic of China on China's Territorial Sea (1958 Declaration),<sup>21</sup> which was promulgated in September 1958, five months after the conclusion of the first United Nations Conference on the Law of the Sea (UNCLOS I). As reflective of China's early practice of the law of the sea, the 1958 Declaration corresponded generally with the principles of UNCLOS I as represented in the 1958 Geneva Conventions on the Law of the Sea.<sup>22</sup> The Geneva Convention on the Territorial Sea and Contiguous Zone did not specify the extent of the territorial sea, but the common practice then was three nautical miles. However, the 1958 Chinese Declaration established a 12-nm territorial sea and declared that this breadth applied to all the Chinese territories, including Taiwan and its surrounding islands, and the islands in the South China Sea. This action may be related to the two most significant physical features of China's geography: the length of its coastline and the size of its continental shelf. It may also have been necessitated by the desire to control foreign fishing activities in its coastal waters and to protect fisheries resources therein.<sup>23</sup> This is evidenced by the fisheries agreements signed between China and Japan dating back to 1955. Most importantly, the bitter Chinese history certainly served as one of the impetuses for China to define a wider territorial sea and to adopt a position of favoring extensive coastal State jurisdiction.

The 1958 Declaration also established, *inter alia*, the straight-baseline method for delimiting the Chinese territorial sea limit and declared the Bohai Sea and Qiongzhou Strait (Hainan Strait) as Chinese internal waters. It also prohibited the entry of foreign military vessels or aircraft into China's territorial sea and the national airspace above it without prior permission. These declarations were protested by a few States on grounds they constituted a unilateral extension of territorial waters and that the straight-baseline system was invalid under international law. It would be fair to say that the Chinese claim to a 12-nm territorial sea was a reflection of what was to become an irreversible trend.

Following the promulgation of the 1958 Declaration, China enacted Regulations Concerning the Passage of Foreign Non-military Vessels through Qiongzhou Strait in 1964 (1964 Regulation). According to this regulation, no foreign military vessels were allowed to pass through the strait, but foreign commercial vessels might pass through the strait with permission requested forty-eight hours in advance and only during daylight hours.

The 1958 Declaration and the 1964 Regulation were the basic legal documents that established China's territorial sea regime. During the past decades, this regime has not been changed, except that foreign commercial vessels are now allowed to pass the Qiongzhou Strait in both daytime and nighttime. The general positions of these documents were effectively carried out on matters concerning China's territorial seas.

China's action in adjusting its territorial sea regime was made by the 1992 TS/CZ Law.<sup>24</sup> In general, the 1992 TS/CZ Law maintained the principles of the 1958 Declaration,<sup>25</sup> but improved the territorial sea regime in a number of aspects, including control over foreign scientific research and other activities,<sup>26</sup> clarification of enforcement authorities,<sup>27</sup> and the establishment of a contiguous zone.<sup>28</sup> Some articles of the 1992 TS/CZ Law are, however, inconsistent with the LOS Convention regime regarding innocent passage of warships and jurisdictional control of security in the contiguous zone.<sup>29</sup>

China's consistent navigation policy that there is no right of innocent passage for warships through the territorial sea posed a constraint on China's ratification of the 1982 LOS Convention. China insists that foreign warship transits should be regulated by requiring prior authorization of, or notification to, the coastal State before passing through the territorial seas. This policy was reiterated in the Maritime Traffic Safety Law of the People's Republic of China (1983), which provides that "no military vessels of foreign nationality may enter China's territorial seas without being authorized by the Government thereof."<sup>30</sup> Although China is not the only nation to have such a requirement—there are more than thirty nations in the world that have made similar pronouncements on this issue—it is suggested that

China amend its legislation on the issue of innocent passage. China may begin by modifying the requirement for prior authorization to one of prior notification for foreign warships wishing to pass through its territorial seas. Such a policy may be a workable compromise between Chinese navigation policy and the innocent passage provisions of the LOS Convention.

Security has been the issue of most concern to China. This is reflected in Article 13 of the 1992 TS/CZ Law, which provides that China exercises control in the contiguous zone to prevent and impose penalties for activities violating Chinese laws and regulations on security, customs, fiscal, sanitary or entry-exit control within its territory, internal waters and territorial sea. The addition of security control is said to be on the basis of existing State practice and China's special circumstances, but it has been criticized for not being consistent with the 1982 LOS Convention.

### **China's EEZ Legislation and Enforcement**

China proclaimed its EEZ upon ratification of the 1982 LOS Convention in 1996. This enabled China to declare sovereign rights over a significant ocean domain, guaranteed its growing interests in ocean-related activities and provided an impetus for China to focus increased attention on the sea bordering its landmass. China finalized its laws on the EEZ and continental shelf by adopting the 1998 EEZ/CS Law.<sup>31</sup> With its sixteen articles, this law ensures China's sovereign rights and jurisdiction over its EEZ and continental shelf, and safeguards China's national interests.<sup>32</sup> It provides a legal framework to manage China's marine resources pursuant to the requirements of the 1982 LOS Convention.

The LOS Convention recognizes historic title or historic waters in articles 10(6), 15 and 46(b) without defining them. It has been observed that the Convention regime for such waters is to be determined in accordance with customary international law.<sup>33</sup> China's 1998 EEZ/CS Law provides in Article 14 that the provisions of "this law shall not affect the historic rights that China enjoys."<sup>34</sup> This provision is confusing in that it does not specify what provisions might affect China's historical rights, and it is not clear what "historical rights" are being referenced.<sup>35</sup> Arguably these rights refer to traditional fishing rights in the South China Sea, as China claims historic title to these waters.<sup>36</sup> Given the overlapping EEZ claims and fisheries disputes between China and its maritime neighbors, it remains to be seen what measures could be worked out among them to resolve this non-specific claim to historic rights.

EEZ enforcement is a key component for coastal State parties to the 1982 LOS Convention in which coastal States' jurisdictional rights are provided to ensure the compliance of management measures in their EEZ. According to the Convention, the EEZ is an area of shared rights and responsibilities between coastal States and

foreign States.<sup>37</sup> In regard to State practice on EEZ enforcement, there is great variation in the national regimes that coastal States have put in place.<sup>38</sup> China favors extensive and exclusive jurisdiction over sea areas for the coastal State, and holds the view that a coastal State is entitled to more control over its EEZ than that provided by the LOS Convention.<sup>39</sup>

Regarding the legal status of the EEZ, China opposed the position that the EEZ should be regarded as part of the high seas. It argued that if the EEZ was to be considered part of the high seas, then it would make no sense to establish such a zone.<sup>40</sup> As far as the rights of other States in the EEZ are concerned, China stated that normal navigation and overflight would not be affected since neither was it part of the territorial sea. Further, China considers that its EEZ serves as a buffer zone for defense.<sup>41</sup> This position is demonstrated by the 2002 amendment of the Surveying and Mapping Law of the People's Republic of China (1992).<sup>42</sup> According to China, the EEZ is a new zone with specific legal status,<sup>43</sup> and coastal States have the right to protect, use, explore and exploit all the natural resources in the zone; to adopt necessary measures and regulations to prevent the resources from being damaged or polluted; and to exercise overall control and regulation of the marine environment and scientific research within the zone.

Along with the development of EEZ activities in the seas, China's maritime law and policy have been enhanced to deal with enforcement issues, including the basic principles of management. Although lacking sufficient capabilities to enforce jurisdiction throughout its EEZ, China has adopted strict domestic measures to control the activities of other States in those waters; these have resulted in some debate about their legality.<sup>44</sup> Indeed, China does not have laws to specify operational procedures for EEZ enforcement. This leaves its 1998 EEZ/CS Law incomplete and difficult to implement.<sup>45</sup> With no other law in place to fill the gap and an urgent need for EEZ enforcement, China needs to accelerate its legislation and improve its capacity for EEZ enforcement. China's practice shows that the EEZ is a relatively new regime in international law, and that its precise nature and the full conceptualization of coastal States' and other States' rights and responsibilities in the EEZ are still evolving.<sup>46</sup>

As a coastal State with increasing interests in the seas and oceans, China has moved away from its previous practice. China has taken action to build up its capacity and institutional framework with long-term strategies.<sup>47</sup> With security being the number one issue, China has made an effort to develop its EEZ enforcement fleet. The Chinese navy, though mainly a coastal defensive force, is one of the largest in the world. In addition, China has devoted more attention and effort to participation in international and regional marine affairs. These activities have contributed to the image of China as an emerging maritime power.

### *Conclusion*

As the most authoritative international instrument with the widest acceptance, the 1982 LOS Convention has changed access to, and the regulation of, the world oceans and ocean-related activities. It provides basic principles for the development of national law and policy and guidelines for State practice, and has remained a dynamic instrument and a point of reference for legal norms at the global, regional and national levels in dealing with the countless marine issues.<sup>48</sup>

As the nation with the greatest population in the world, China is playing an increasingly more active role in international affairs and is undergoing a rapid transformation into the world's most influential force in globalization. In the realm of the law of the sea, the years that have followed China's ratification of the 1982 LOS Convention have witnessed major changes in China's attitude toward the Convention and international marine affairs. Through the implementation of the LOS Convention framework, China has made a distinctive enhancement in the development of Chinese national law and policy.

This analysis of China's implementation practices has shown that China has embraced opportunities to develop its legal and policy framework to safeguard its rights and interests related to the oceans and seas. In reviewing the actions taken, it can be concluded that China, as a contracting party, has made a solid effort to implement the 1982 LOS Convention regime. China, for its part, has been accelerating domestic procedures with a view to enabling it to comply with Convention obligations, and has made progress in legislative harmonization and policy adjustment. Notwithstanding its noticeable effort, the LOS Convention practice of China has not, as a whole, been totally consistent with Convention provisions—its legislation is incomplete and enforcement remains weak. China's position is clear: to secure an opportunity for its national interests and to accept the accompanying commitments at the same time.

China once focused almost exclusively on its status as a coastal State. Now China has come to realize that freedom of navigation throughout the world's oceans and through and over international straits is indispensable not only for its booming international trade but also for ensuring the steady stream of imported oil necessary to fuel its remarkably growing economy. Facing considerable structural, manpower and financial constraints within the ocean administrative system, China needs to set priorities to overcome political, economic, legal and technical obstacles, and to improve its overall management capacity. China also needs to adopt operational regulations regarding maritime enforcement issues to comport with the requirements of the 1982 LOS Convention.

*Notes*

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter 1982 LOS Convention].
2. The names of these seas are commonly used in English. The use of the term “China Seas” does not imply that the seas somehow accrue to China. In Chinese, the East China Sea and the South China Sea are simply the East Sea (Donghai) and the South Sea (Nanhai), respectively.
3. For an examination of China’s maritime interests and security issues, see Chris Rahman, *The Rise of China as a Regional Maritime Power: Strategic Implications for a New Century* (2003) (unpublished Ph.D. dissertation, University of Wollongong, Australia) (on file with author).
4. China returned to the United Nations in 1971 and participated in all sessions of UNCLOS III. See CHOON-HO PARK, *EAST ASIA AND THE LAW OF THE SEA* 107 (2d ed. 1985). For a discussion of China’s participation in UNCLOS III and its practice under the 1982 LOS Convention, see JEANETTE GREENFIELD, *CHINA’S PRACTICE IN THE LAW OF THE SEA* 193–205, 231 app. 2, 233 app. 3, 235 app. 4 (1992). See also Zhiguo Gao, *China and the LOS Convention*, 15 MARINE POLICY 199 (1991).
5. GREENFIELD, *supra* note 4, at 231 app. 2.
6. See Guoxing Ji, *Maritime Jurisdiction in the Three China Seas: Options for Equitable Settlement*, in *UN CONVENTION ON THE LAW OF THE SEA AND EAST ASIA* 87 (Dalhoong Kim et al. eds., 1996).
7. Tieya Wang, *China and the Law of the Sea*, in *THE LAW OF THE SEA AND OCEAN INDUSTRY: NEW OPPORTUNITIES AND RESTRAINTS: PROCEEDINGS OF THE LAW OF THE SEA INSTITUTE, SIXTEENTH ANNUAL CONFERENCE* 584 (D.M. Johnston & N.G. Letalik eds., 1982).
8. All the coastal States around the China Seas have ratified the 1982 LOS Convention except North Korea, and all of them have claimed a 200-nm EEZ. A listing of the various EEZ claims is available at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table\\_summary\\_of\\_claims.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf) (last visited Nov. 17, 2007).
9. For a brief account of the maritime claims of these States, see Mark J. Valencia, *The South China Sea: Prospects for Marine Regionalism*, 2 MARINE POLICY 87 (1978).
10. Eight parties presently claim title to the South China Sea islands. China, both mainland and Taiwan, and Vietnam contest ownership of the Paracel Islands. Six claims are asserted to the Spratlys: China, both mainland and Taiwan, and Vietnam claim the entire archipelago, while the Philippines, Malaysia and Brunei claim sovereignty over certain portions of the area. See Christopher C. Joyner, *The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-politics in the South China Sea*, 13 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 195 (1998). See also Stuart B. Kaye, *The Spratly Islands Dispute: A Legal Background*, 102 MARITIME STUDIES, Sept.–Oct. 1998, at 14–25. For a discussion on the influence of the islands in the South China Sea, see Alex G. Oude Elferink, *The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?*, 32 OCEAN DEVELOPMENT & INTERNATIONAL LAW 169–90 (2001).
11. As Valencia observes, the region “is especially complicated in that it is surrounded or used by states sharing a similar historical and cultural background, but differing in internal political systems, external political and economic alignment, and levels of economic development.” See Mark J. Valencia, *The Yellow Sea: Transnational Marine Resource Management Issues*, 12 MARINE POLICY 382, 382 (1988).
12. See Choon-ho Park, *Fishing Under Troubled Waters: The Northeast Asia Fisheries Controversy*, 2 OCEAN DEVELOPMENT & INTERNATIONAL LAW 114 (1974).

13. Choon-ho Park, *The South China Sea Disputes: Who Owns the Islands and the Natural Resources?*, 5 OCEAN DEVELOPMENT & INTERNATIONAL LAW 27, 30 (1978).
14. For a discussion of China's boundary issues, see PARK, *supra* note 4, at 245–70.
15. See Daojiong Zha, *China's Exploitation of South China Sea Resources: The Case of Hainan Province* 2 (International University of Japan Research Institute Working Paper, Asia Pacific Series No. 15, presented at the Human and Regional Security around the South China Sea conference, University of Oslo, Oslo, Norway, June 2–4, 2000), <http://www.iuj.ac.jp/research/archive/wpaper/wpaper015.html>.
16. *Id.* at 1. See also Nguyen Hong Thao, *Vietnam and the Code of Conduct for the South China Sea*, 32 OCEAN DEVELOPMENT & INTERNATIONAL LAW 105 (2001).
17. For a comprehensive discussion of China's claims and activities in the South China Sea, see GREG AUSTIN, CHINA'S OCEAN FRONTIER: INTERNATIONAL LAW, MILITARY FORCE AND NATIONAL DEVELOPMENT (1998).
18. For a discussion of the navigational importance of the South China Sea, see Park, *supra* note 13. See also PARK, *supra* note 4, at 83.
19. See Thao, *supra* note 16, at 124 app. 1.
20. The 1992 TS/CZ Law was adopted by the Standing Committee of National People's Congress in 1992. For the Chinese and English versions, see STATE OCEANIC ADMINISTRATION, COLLECTION OF THE SEA LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 4–6, 201–15 (2001) [hereinafter COLLECTION OF THE SEA LAWS AND REGULATIONS]. The 1998 EEZ/CS Law was approved by the same legislative authority in 1998. For the Chinese and English versions, see *id.* at 11–14, 210–15.
21. See Declaration of the Government of the People's Republic of China on China's Territorial Sea (Sept. 4, 1958) [hereinafter 1958 Declaration]. For Chinese and English versions, see *id.* at 1–2, 197–98. According to Greenfield, China acknowledged the concept of territorial waters as early as 1874. See GREENFIELD, *supra* note 4, at 57. The declaration defined the application of China's sovereignty (paragraph 1 states that China's sovereignty applies to some islands separated from the mainland and four large groups of archipelagos in the South China Sea); established a 12-nm breadth territorial sea measured from straight baselines; claimed internal waters, including the Bohai Sea and Qiongzhou Strait; and required foreign military vessels to obtain permission before passing through China's territorial sea. 1958 Declaration, COLLECTION OF THE SEA LAWS AND REGULATIONS, *supra* note 20, paras. 1, 2 and 3.
22. Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311; Convention on the High Seas, Apr. 28, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 92. The adoption of some Geneva principles indicates China's intention to stay within the broad framework of the Geneva Conventions. See PARK, *supra* note 4, at 17. For China's attitude toward the four Geneva Conventions (the fourth is the Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285), see Gao, *supra* note 4, at 199–201. See also JEANETTE GREENFIELD, CHINA AND THE LAW OF THE SEA, AIR AND ENVIRONMENT 18 (1979).
23. Park is of the opinion that China's claim to a 12-nm territorial sea should be viewed against its bitter history of being invaded on six occasions from the sea. See PARK, *supra* note 4, at 16. See also Wang, *supra* note 7, at 582.
24. For discussions of this adjustment, see Liyu Wang & Peter H. Pearse, *The New Legal Regime for China's Territorial Sea*, 25 OCEAN DEVELOPMENT & INTERNATIONAL LAW 434 (1994); Max Herriman, *China's Territorial Sea and the Contiguous Zone Law and International Law of the Sea*, MARITIME STUDIES, Jan.–Feb. 1997, at 15–20; Yann-Huei Song & Keyuan Zou, *Maritime*

*Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States*, 31 OCEAN DEVELOPMENT & INTERNATIONAL LAW 303–45 (2000).

25. Articles 2, 3 and 6 of the 1992 TS/CZ Law retain the 12-nm breadth of the territorial sea, straight baselines, prior approval of foreign military vessels and sovereignty over China's archipelagos and islands claimed in the 1958 Declaration. Article 2 of the 1992 TS/CZ Law specifically mentions the name of the claimed islands in the East China Sea and the South China Sea, in particular the Diaoyu (Senkaku) Islands. Some nations of East Asia expressed concern over this announcement. See *Testing the Waters*, FAR EASTERN ECONOMIC REVIEW, Mar. 12, 1992, at 9; Lee G. Cordner, *The Spratly Islands Dispute and the Law of the Sea*, 25 OCEAN DEVELOPMENT & INTERNATIONAL LAW 65 (1994).

26. 1992 TS/CZ Law, *supra* note 20. Article 11 requires that all international organizations and foreign organizations or individuals obtain approval before carrying out scientific research and other activities in the territorial sea.

27. *Id.*, arts. 8, 9, 10, 11, 13 and 14. The 1958 Declaration was silent about the control of the territorial sea. It might be subject to domestic regulations in this regard.

28. In 1996, China promulgated a number of baseline coordinates upon its ratification of the 1982 LOS Convention. See Declaration of the Government of the People's Republic of China on the Baseline of the Territorial Sea of the PRC, COLLECTION OF THE SEA LAWS AND REGULATIONS, *supra* note 20, at 7–10, 206–209. This brought an end to the uncertainty of China's territorial sea baseline and produced a more effective position to protect China's sovereignty. For a discussion of this development, see Keyuan Zou, *The Establishment of a Marine Legal System in China*, 13 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 23, 28 (1998).

29. 1992 TS/CZ Law, *supra* note 20, arts. 4, 13. See X. NI & A. ZHAO, AN INTRODUCTION TO THE TERRITORIAL SEA AND CONTIGUOUS ZONE 84 (1993) (in Chinese). Morgan is of the view that the security zones claimed by China and North Korea in the Yellow Sea, though not sanctioned by the 1982 LOS Convention, appear to contribute to the stability of the region. See J.R. Morgan, *Maritime Zones in the Yellow Sea and their Effects on SLOC Security*, in THE REGIME OF THE YELLOW SEA: ISSUES AND POLICY OPTIONS FOR COOPERATION IN THE CHANGING ENVIRONMENT 51, 59–61 (Choon-ho Park et al. eds., 1990).

30. Available at <http://tradeinservices.mofcom.gov.cn/en/b/2007-12-21/18512.shtml>.

31. 1998 EEZ/CS Law, *supra* note 20. It is obvious that this legislative action was stimulated by neighboring States' legislative moves on the same subject. Japan and South Korea promulgated their EEZ and continental shelf statutes in 1996.

32. *Id.*, art. 1. The 1982 LOS Convention grants coastal States sovereign rights to the natural resources of their EEZs and jurisdiction over certain activities. See 1982 LOS Convention, *supra* note 1, art. 56.

33. Elferink, *supra* note 10, at 172.

34. China claims historical rights to the South China Sea. See 1998 EEZ/CS Law, *supra* note 20, art. 14. *See also* AUSTIN, *supra* note 17, at 206–22.

35. There was no explanation of this provision during its legislative process. For a comprehensive discussion, see Keyuan Zou, *Historic Rights in International Law and in China's Practice*, 32 OCEAN DEVELOPMENT & INTERNATIONAL LAW 149 (2001).

36. See Jinming Li & Dexia Li, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 OCEAN DEVELOPMENT & INTERNATIONAL LAW 292 (2003).

37. The 1982 LOS Convention provides coastal States sovereign rights and jurisdiction over natural resources, whereas foreign States retain certain freedoms, such as navigation and overfly. See 1982 LOS Convention, *supra* note 1, art. 58.

38. See GERALD K. MOORE, UN FOOD & AGRICULTURE ORGANIZATION, COASTAL STATE REQUIREMENTS FOR FOREIGN FISHING (1981).

39. See Morgan, *supra* note 29, at 58. China is of the view that the use of the EEZ for non-peaceful purposes such as military and electronic intelligence gathering is illegal. See Xizhong Cheng, *A Chinese Perspective on ‘Operational Modalities’*, 28 MARINE POLICY 25 (2004).

40. See GREENFIELD, *supra* note 4, at 231 app. 2, 233 app. 3, 235 app. 4 for China’s working papers submitted to UNCLOS III.

41. Morgan, *supra* note 29, at 61.

42. Promulgated by Presidential Decree No. 66 and effective on July 1, 1993. See COLLECTION OF THE SEA LAWS AND REGULATIONS, *supra* note 20, at 64–70, 300–13. The announcement of the amendment to that law followed the confrontation with the US Navy’s ocean-survey ship *USS Bowditch* (AGS 4) by Chinese military patrol aircraft and ships in September 2002. See Bill Gertz, *China Enacts Law Extending Its Control*, WASHINGTON TIMES, Jan. 27, 2003, at 1.

43. For a supporting view, see OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR THE LAW OF THE SEA, THE LAW OF THE SEA: NATIONAL LEGISLATION ON THE EXCLUSIVE ECONOMIC ZONE, THE ECONOMIC ZONE AND THE EXCLUSIVE FISHERY ZONE, U.N. Sales No. E.85.V.10 (1986). “EEZ is subject to a ‘special regime’. The regime is specific in the sense that the legal regime of the EEZ is different from both the territorial sea and the high seas. It is a zone which partakes of some of the characteristics of both regimes but belongs to neither.” *Id.* at 13.

44. See Mark J. Valencia, *Summary of the Bali Dialogue*, 28 MARINE POLICY 7 (2004).

45. This gap was partly filled by several ministerial regulations regarding fishing vessels. In June 1999, the Ministry of Agriculture (MOA) issued the Provisional Regulations on Foreigners and Foreign Fishing Vessels in the Sea Waters under the Jurisdiction of China. Series No. 18 of the MOA, June 24, 1999, Fisheries Management Bureau, Database for Fisheries Laws and Regulations (1949–99) (in Chinese).

46. China’s EEZ enforcement practice may also suggest that international law is determined not so much by conventions but by the practice of States. With the changed global political dynamics, the international legal framework needs to develop to be consistent with the current context. For a summary of States’ EEZ legislation and practice, see UN DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, OFFICE OF LEGAL AFFAIRS, THE LAW OF THE SEA: PRACTICE OF STATES AT THE TIME OF ENTRY INTO FORCE OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 9–13, UN Sales No. E.94.V.13 (1994). See also Mark J. Valencia, The Regime of the Exclusive Economic Zone: Issues and Responses, A Report of the Tokyo Meeting February 2003, available at <http://www.eastwestcenter.org/news-center/coming-up/coming-up-archive-february-2003/>.

47. The analysis of the provisions of the 1998 EEZ/CS Law, *supra* note 20, and China’s EEZ practice indicates that China’s implementation action is consistent with the general principles of the provisions of the 1982 LOS Convention. For instance, Articles 2, 3 and 5 of the 1998 EEZ/CS Law are virtually a verbatim copy of Articles 56(1) and 77(1) of the Convention. Article 10 of the 1998 EEZ/CS Law specifies that China is to prevent and control marine pollution.

48. UNITED NATIONS, OCEANS: THE SOURCE OF LIFE – UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 20TH ANNIVERSARY (1982–2002) 12 (last updated Feb. 10, 2004), available at [http://www.un.org/Depts/LOS/convention\\_agreements/convention\\_20years/oceansourceoflife.pdf](http://www.un.org/Depts/LOS/convention_agreements/convention_20years/oceansourceoflife.pdf).

# V

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## The 1982 United Nations Convention on the Law of the Sea: An Historical Perspective on Prospects for US Accession

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Horace B. Robertson Jr.\*

### *Early Background*

Contrary to popular belief, the initiative for the Third United Nations Conference on the Law of the Sea did not originate with Ambassador Pardo's famous speech before the General Assembly in 1967. Although this speech dramatized ocean seabed issues to the international community and gave us the now-famous phrase of "common heritage of mankind," the idea for a third conference germinated from several different sources, one of the principal of which was the US government.

More than a year prior to Ambassador Pardo's speech, the US House of Representatives touched off the process in a letter to the Department of State suggesting a study of the international implications of developing resources of the seabed. The reply from the Assistant Secretary for Congressional Relations indicated that the State Department "was unaware of any need for a study of international law or foreign policy relating to the development of the natural resources of the oceans."<sup>1</sup> The attention of the State Department was pricked again in 1966 when the Soviet Union sent a letter to some sixty States about the possibility of convening a third

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law of the sea conference.<sup>2</sup> The letter dealt explicitly only with the issue of the breadth of the territorial sea, which was left unresolved by the 1958 Convention on the Territorial Sea and Contiguous Zone and the failed 1960 Second United Nations Conference on the Law of the Sea.<sup>3</sup> This letter was basically an appeal to affirm the Soviet position on the 12 mile territorial sea.<sup>4</sup> When the Soviet proposal was received, it touched off a six-month study by the Departments of State and Defense and the Bureau of Commercial Fisheries.<sup>5</sup> This study group concluded that the Department of Defense could live with a 12 mile territorial sea, provided it was accompanied by a right of free passage through international straits, but it also recognized that this solution was not attainable without some accommodation between coastal and maritime States with respect to fisheries. There was also apprehension by the Department of Defense that the process might get out of control and urged that any international negotiation should be conducted in “manageable packages.”<sup>6</sup>

Concurrently with this effort, the Office of International Organizations of the Department of State, apparently without extensive vetting by other departments, launched its own initiative in the United Nations. James Roosevelt, the US delegate to the United Nations, sent a letter to Secretary-General U Thant suggesting that the Secretariat conduct a study “of the state of knowledge concerning undersea resources and exploitation technology.”<sup>7</sup> As an immediate consequence, the UN Economic and Social Council adopted a resolution requesting the Secretary-General “make a survey of the present state of knowledge of [the non-fish resources of the sea beyond the continental shelf], and of the techniques for exploiting these resources,” particularly those capable of exploitation for the benefit of developing countries.<sup>8</sup>

Echoing this theme, President Johnson, in his remarks at the commissioning of the ocean research ship *Oceanographer* in 1966, stated:

[U]nder no circumstances, we believe, must we ever allow the prospects of rich harvests and mineral wealth [of the oceans] to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are the legacy of all human beings.<sup>9</sup>

With this as background, it was not really a giant step for Ambassador Pardo, representing the State of Malta, to propose in 1967 that the mineral resources of the seabed beyond national jurisdiction be declared the “common heritage of mankind” to be developed for the benefit of all nations.<sup>10</sup> He went on to predict that the volume of these resources was so vast and so easily mined that in a few years the

ores would yield at least \$5 billion profit annually to be distributed for the benefit of the poorer countries of the Third World.<sup>11</sup> The US Ambassador to the United Nations, Arthur Goldberg, heartily endorsed including the item on the agenda of the First Committee.<sup>12</sup>

Enticed by the “mirage” of the wealth of the deep seabed predicted by Ambassador Pardo, the UN General Assembly rapidly formed an ad hoc committee to study seabed issues—the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction.<sup>13</sup> This committee, in turn, was made a permanent committee and morphed into the Preparatory Committee for a Third United Nations Conference on the Law of the Sea.

Congress quickly took notice of the Malta proposal, and almost immediately several bills were introduced in the House and Senate, mostly unfavorable to the idea of an international regime for the seabed. In testimony before several committees that held hearings on the issue, Johnson administration witnesses displayed some uncertainty and confusion about the US position but generally stated that given the present state of knowledge, it was premature to consider international control over the resources of the seabed.<sup>14</sup> The UN resolution and the uncertainty indicated by the congressional hearings did, however, stimulate action within the Executive Branch to take action to coordinate the formation of a unified US policy on the law of the sea, responsibility for which previously had been divided among many departments. The result was the creation of the Committee on International Policy in the Marine Environment (CIPME), under the chairmanship of the Deputy Under Secretary of State. Day-to-day leadership was under the International Organizations Office of the State Department, but eventually was assumed by the Legal Adviser.<sup>15</sup> By the time of the second session of the Ad Hoc Seabed Committee in June 1968, as a result of the work of the CIPME, the United States was able to submit to the Seabed Committee a draft declaration of seven principles, two of which were

- (1) that no state might claim or exercise sovereignty or sovereign rights over any part of the deep ocean floor; and (2) that international arrangements to govern exploitation of deep-sea resources should be established as soon as practicable, with provisions for the orderly development of resources and for the dedication of a part of the value of the resources to “international community purposes.”<sup>16</sup>

By 1970 the principle of the deep seabed as the common heritage of mankind was apparently so firmly established within the US government’s policy on the law of the sea that it was included in President Nixon’s ocean policy statement of May 23, 1970, in which he stated, in part:

I am today proposing that all nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters . . . and would agree to regard these resources as the common heritage of mankind.<sup>17</sup>

The President's statement went on to say that the treaty should establish an international regime for the exploitation of seabed resources beyond this limit and provide for agreed international machinery to authorize and regulate exploration and use of seabed resources beyond the continental margin.<sup>18</sup> On August 3 of the same year, the United States submitted to the UN Seabed Committee a draft UN Convention on the International Seabed as "a working paper for discussion purposes" that spelled out the details of machinery for the exploration and exploitation of the seabed beyond national jurisdiction, and provided that developing countries would share in the revenues.<sup>19</sup> It also included a provision for the establishment of a law of the sea tribunal for settlement of disputes.<sup>20</sup>

### *The Opposition Emerges*

It can be seen then that, from the outset, the principle of the "common heritage of mankind" and the creation of an international body to orchestrate the exploration and exploitation of its mineral resources was not something invented by Third World States to use against the United States, but was a principle accepted and advanced from the outset by the US government at all levels. What, then, changed between 1970 and 1982 to make that principle, as now codified in Part XI of the Law of the Sea Convention<sup>21</sup> unacceptable to the United States at that time? The stated cause, as expressed by President Reagan in his January and July 1982 announcements that the United States would not adhere to the Convention, was the specific terms of the machinery adopted to implement the common-heritage principle in the deep seabed. In his statements, the President identified six provisions in Part XI of the Convention that could not be accepted by the United States. He added, however, that if these objectionable provisions were corrected, he would support ratification.<sup>22</sup>

The President's statement was reinforced and amplified a month later by the statement of the President's then-Special Representative for the Law of the Sea, Ambassador James L. Malone, in his statement to the House Merchant Marine and Fisheries Committee in which he testified that the United States has "a strong interest in an effective Law of the Sea Treaty"<sup>23</sup> and six months later when he testified before the House Foreign Affairs Committee that the United States was "not seeking to change the basic structure of the treaty" or "to destroy the system" but rather to "make it work."<sup>24</sup>

With the defects in the machinery identified by President Reagan having been fixed by the 1994 Agreement superseding the objectionable elements of Part XI;<sup>25</sup> with President Clinton having forwarded the Convention and the 1994 Agreement to the Senate strongly recommending adherence;<sup>26</sup> with his successor, George W. Bush, having strongly renewed that recommendation;<sup>27</sup> and with the Senate Republican-chaired Foreign Relations Committee having unanimously recommended that the Senate give its advice and consent to the Convention in 2004,<sup>28</sup> why is there still controversy even in getting it to a vote by the full Senate?

The result may be partly the result of higher-priority items displacing it on the Senate agenda—after all, the argument goes, the American stakeholders appear to be functioning without difficulty in a non-treaty environment. But the major bugaboo, in my view and that of others as well, in 1982, as well as today, is ideological. The most vocal opposition advocates view with suspicion any action by the United States that accepts any arrangement for decision making by an international institution. In their view this is a “surrender of sovereignty.”<sup>29</sup>

This ideology was stated early on in a surprising statement by Ambassador Malone at the Sixth Annual Conference of the University of Virginia Center for Oceans Law and Policy held in Montego Bay in January 1983—only one month after the opening of the Convention for signature at the identical location and only six months after the President’s announcement of his decision not to sign the Convention. The statement was “surprising” in that it directly contradicted the President’s statement and Ambassador Malone’s contemporaneous testimony before the two House committees that the US objective was not to scuttle the Convention but to make it work. At the University of Virginia Conference, Mr. Malone stated:

The Treaty . . . is a document which, hiding behind the mask of superficially appealing slogans like the “new international economic order” and the “common heritage of mankind,” promotes a thinly disguised world collectivism. It is intended as an instrument for the redistribution of the world’s wealth from those who have acquired their prosperity by risk, sacrifice, and hard work to those who seek to promote their prosperity through organizational means.<sup>30</sup>

Replying to those who suggested that the flaws could be corrected through “PREPCOM, and other means,” he added, “The plain fact is that there exists no possibility nor instrument for making the important changes that would satisfy President Reagan’s objections.”<sup>31</sup>

Ambassador Malone continued:

The potential impact on the U.S., its friends and allies is without parallel. Think of the latent danger. We are discussing an institution that would exert supreme control over

the deep oceans and their mineral wealth representing over 60% of the resource potential of planet Earth.

I sometimes wonder how many informed and well-meaning Americans can be willing to compromise principals [sic] and values which support America's national greatness and mortgage our future economic health and security interests for a treaty that is little better than an international entitlement program—a give away.<sup>32</sup>

### *Opposition Arguments against the Convention*

The arguments put forth by Ambassador Malone's remarks at the University of Virginia conference form the core of current arguments against adherence to the Convention—that is, the Convention is a surrender of sovereignty and amounts to a giveaway.<sup>33</sup> Opponents bolster their arguments by pointing out what they perceive as specific flaws in the substantive provisions of the Convention. They are phrased somewhat differently in the many statements originating with the opposition, but in essence they boil down to the following:

1. The seabed provisions (Part XI) give the International Seabed Authority (ISA) jurisdiction over all activities occurring in over 70 percent of the earth's surface (ocean, seabed and airspace above);
2. The 1994 Agreement did not really correct the flaws in Part XI of the Convention;
3. Adherence to the Convention would impede the conduct of US maritime intelligence operations and the Proliferation Security Initiative (PSI);
4. Since most of the provisions of the Convention reflect customary international law, we don't need the Convention to protect our maritime interests;
5. The Convention's provisions for compulsory dispute settlement could result in bringing the United States within the jurisdiction of an international tribunal against our will;
6. The Convention gives the International Seabed Authority power to "levy taxes" (some critics conflate the Convention's seabed-governing body (the ISA) into the United Nations); and
7. Pressure to accede to the Convention is a "rush to judgment."

### *Counterarguments*

All of the foregoing criticisms have been effectively answered in detail by government officials and independent experts numerous times and in detail in many fora, including congressional hearings, official reports and other public discussions. I will not attempt to answer them in detail in this article but will briefly summarize

the gist of the responses and, where appropriate, provide in the endnotes some reference to where the interested reader may find amplification.<sup>34</sup>

### **Jurisdiction of the International Seabed Authority**

The jurisdiction of the ISA is limited to the “solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed.”<sup>35</sup> The Area, in turn, is defined as “the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.”<sup>36</sup> Article 135 explicitly provides, “Neither this Part [Part XI] nor any rights granted or exercised pursuant thereto shall affect the legal status of the waters superjacent to the Area or that of the air space above those waters.”

### **The 1994 Agreement**

The changes adopted in this “Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982” supersede any conflicting terms in the 1982 LOS Convention and meet all of the objections raised by President Reagan in his 1982 statement. The Agreement substantially overhauls the Authority’s decision-making procedure, including provisions guaranteeing the United States a permanent seat on the powerful Council and Finance Committee. It requires that in these bodies important decisions and financial decisions be made by consensus, thus, in essence, giving the United States veto power. The development principles incorporated in the Agreement are market-based and require the operating arm (the Enterprise), when activated, to compete on the same basis as other commercial enterprises. It eliminates all subsidies inconsistent with the General Agreement on Tariffs and Trade. The site claims of mining companies already licensed under US laws are grandfathered, and the requirement for mandatory transfer of technology is eliminated.<sup>37</sup> In a letter to the Chairman of the Senate Armed Services Committee, all living former Legal Advisers of the Department of State, who constitute a continuum of service from 1977 to 2000, authoritatively refuted the argument that the 1994 Agreement had not cured the provisions of the 1982 Convention to which President Reagan objected.<sup>38</sup>

### **Proliferation Security Initiative and US Maritime Intelligence Surveillance**

The US-developed PSI is directed toward preventing the illicit transportation by ships of weapons of mass destruction, their delivery systems and related materials. Under the Law of the Sea Convention and customary international law, a number of jurisdictional bases exist for stopping and searching ships suspected of being engaged in some sort of illicit activity. These include jurisdiction exercised by a State with respect to ships flying its flag or within its territorial sea, ports or contiguous

zone, and stateless vessels. It is also permissible to stop and search a foreign-flag vessel with the permission of the flag State. The PSI builds on this latter basis of jurisdiction with a series of bilateral agreements by which the United States and its treaty partners agree in advance on a set of orderly procedures for the reciprocal granting of permission for visits and search of suspected ships and cargoes. There is nothing in the Convention that would change the law in any respect with respect to the US practices under the Proliferation Security Initiative.<sup>39</sup>

Likewise, with respect to intelligence operations, the Law of the Sea Convention contains no restrictions on US naval surveillance and intelligence operations not already included in the 1958 Convention on the Territorial Sea and Contiguous Zone to which the United States is already a party.<sup>40</sup>

### **Customary Law of the Sea as an Acceptable Alternative to the Convention**

There is at least a germ of truth in this argument. The United States and its maritime activities are functioning reasonably well under the customary regime of the law of the sea. Most of the Convention is indeed a codification of customary international law. President Reagan's 1982 statements acknowledged this and pledged that the United States would abide by its rules.<sup>41</sup> But customary law does not provide the precision and detail of a written document. It may establish a principle, but its content may remain imprecise, subject to a range of interpretations. With respect to the exclusive economic zone (EEZ), for example, it is generally conceded today that the principle of the zone has become a part of customary international law. But what about its content? The details are contained in a set of articles codifying a series of compromises worked out in meticulous detail in the negotiations leading up to the signing of the Convention. The rules for determining the allowable catch of the living resources of the EEZ, the determination of the coastal State's capacity to harvest them, the determination of the allowable catch by other States and the rules governing the coastal State's establishing of terms and conditions for foreign fishermen in their EEZs are laid out in detail.<sup>42</sup>

Customary rules are fuzzy around the edges and may not be recognized as binding by an opposing State. The "jurisdiction creep," which continued after the 1958 and 1960 First and Second UN Conferences on the Law of the Sea, illustrated the futility of relying on customary law to protect our vital security interests. Only a written document can provide the certainty and stability required by our governmental agencies and private maritime enterprises. And in any dispute with a foreign State to secure its compliance with the rules set forth in the Convention, arguments based on a written agreement rather than an asserted principle of customary international law would be much more effective.

Also, international institutions cannot be created by custom. Only through agreements can this occur. The institutions incorporated in the Convention are essential to its proper functioning—the Seabed Authority, the Commission on the Limits of the Continental Shelf, the Law of the Sea Tribunal and the other dispute settlement mechanisms provided for in Part XV and Annexes V to VIII of the Convention. The marine scientific research articles (Part XIII) of the Convention also provide for implied consent to research requests in foreign waters if there is no reply within fixed time limits, a right not accorded to the United States as a non-party.<sup>43</sup>

Some States also argue that some of the rights of navigation set forth in the Convention are the contractual products of the negotiations and are available only to parties to the Convention. These rights include the right of transit passage through international straits and archipelagic sea lanes passage, both of the utmost importance to the United States.<sup>44</sup>

### **Compulsory Dispute Settlement**

From the outset the United States has insisted that a system of compulsory dispute settlement be a part of any comprehensive convention on the law of the sea.<sup>45</sup> The US delegation, in the person of the late Louis Sohn, took the lead in the negotiating group that developed the final package, which became Part XV of the Convention and its related Annexes. It is incongruous that the flexible provisions of Part XV, worked out under the leadership of the United States, should now be the basis of objection to the Convention. The objectors suggest, without basis in fact, that the United States might be dragged against its will into the jurisdiction of the Law of the Sea Tribunal, particularly with respect to our military activities.<sup>46</sup> They ignore the terms of the Convention that provide, with respect to compulsory procedures entailing binding decisions, an opportunity for States, upon signing, ratifying or acceding to the Convention, “or at any time thereafter,” to choose the binding procedure it will accept from a menu of settlement mechanisms.<sup>47</sup> The United States has indicated that it will choose arbitration under Annexes VII and VIII upon accession.<sup>48</sup> Further, the criticism ignores the provisions of Article 298 that provide that State parties may exclude from the applicability of “any” of the compulsory procedures providing for binding decisions, *inter alia*, “disputes concerning military activities.” One of the declarations that will accompany any US accession to the Convention will state that its accession “is conditioned upon the understanding that, under article 298(1)(b), each State Party has the exclusive right to determine whether its activities are or were ‘military activities’ and that such determinations are not subject to review.”<sup>49</sup>

### **The Power to Levy Taxes**

This argument is a distortion of the requirements of the Convention for funding the International Seabed Authority. Under these provisions, during the period until the ISA can become self-supporting, funding its operations depends on assessments against States party to the Convention. In 2004 the Legal Adviser of the Department of State estimated that had the United States been a party to the Convention, its assessments for 2004 would have been a little over \$1 million for the Authority and less than \$2 million for the Seabed Tribunal.<sup>50</sup>

The taxation objection made by opponents is often coupled with an argument that US companies that had invested millions of dollars in exploration costs would lose their existing claims under US law. This argument ignores the fact that the 1994 Agreement grandfathered these holders into the treaty regime based on arrangements no less favorable than those granted to holders of claims already registered with the Authority upon certification by the US government and the payment of a \$250,000 application fee (a fee that is half of the fee established in the 1982 Convention).<sup>51</sup> As Ambassador Colson pointed out in the 1994 hearings, “If the U.S. does not become Party to the Convention, international recognition of the rights of the U.S. licensed consortia could be jeopardized.”<sup>52</sup>

### **A “Rush to Judgment”**

Rather than a “rush to judgment,” it is hard to find any aspect of the Convention that has not been discussed and debated *ad infinitum*—in the public media, in academic conferences and symposia, in legal and ocean policy literature, and in congressional hearings. It has been studied and restudied by each successive administration, and every government department and agency with a concern in the oceans supports accession. In March 2007, in testimony before the Subcommittee on Fisheries, Wildlife, and Oceans of the Natural Resources Committee of the House of Representatives, Admiral James D. Watkins and Leon E. Panetta, Co-chairmen of the Joint Ocean Commission Initiative, renewed their strong endorsement of the Convention, saying, among other things, that the failure of the United States to become a party to the Convention is “one of the most serious international ocean policy issues that remain unresolved for our nation.”<sup>53</sup>

On May 15, 2007, President George W. Bush issued a formal statement urging the Senate

to act favorably on U.S. accession to the United Nations Convention on the Law of the Sea during this session of Congress. Joining will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide. It will secure U.S. sovereign rights over extensive marine areas, including the valuable

natural resources they contain. Accession will promote U.S. interests in the environmental health of the oceans. And it will give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted.<sup>54</sup>

With this overwhelming support from all segments of the US economic and governmental structure, one would think that Senate advice and consent to accession would be a “slam dunk.” The immediate effect, however, was a flurry of media articles in opposition to the Convention, most of them from familiar names previously identified with the opposition.<sup>55</sup> Their arguments were the same as have been endlessly repeated since the Convention was adopted in 1982, with but one new argument I had not heard before. That is that the United States is giving up sovereignty under the terms of Article 2, which provides, “The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.”<sup>56</sup> This argument conveniently ignores the fact that the United States is already bound by identical text in the 1958 Convention on the Territorial Sea and Contiguous Sea.<sup>57</sup>

### *The Costs of Non-adherence*

There are tangible costs for the United States in not being a party to the Law of the Sea Convention. Until 1998, the United States was entitled to provisional membership in the meetings of the States party to the Convention, but since then it can be present only as an observer. Its non-accession has had and continues to have real costs. It is ineligible to nominate members to the Law of the Sea Tribunal; it has forfeited (as of March 2007) the opportunity to nominate members to the Commission on the Limits of the Continental Shelf until the next election in 2012,<sup>58</sup> and it cannot occupy its guaranteed seat on the Council of the Seabed Authority and the powerful Finance Committee. The marine scientific research institutions continue to suffer from long delays in gaining approval for research in foreign EEZs, which would be alleviated by the Convention’s implied consent provisions were the United States a party.<sup>59</sup>

Perhaps as damaging as the concrete benefits of the Convention previously discussed is the harm to the credibility of the United States in international relations by failing to accede to the Convention. After all, we laid out before the world in President Reagan’s 1982 statements our objections to the Convention and what would be required for the United States to become a party. By adopting the 1994 Agreement, the international community gave us what we demanded as conditions for our accession, and now, thirteen years later, the United States has still not become a party.

*Current Prospects for Accession*

As of the date of preparation of this paper for publication (early September 2007), there are indications that the Senate is prepared to take action toward granting its advice and consent to accession to the Law of the Sea Convention. Both Senator Biden, Chairman of the Senate Foreign Relations Committee, and Senator Lugar, the senior minority member, are strong supporters of the Convention. It is anticipated that the Senate Foreign Relations Committee will hold further hearings toward the end of September. Both the Department of State and the Department of Defense appear to have mounted a “full-court press” to obtain Senate approval.<sup>60</sup> The Commandant of the Coast Guard has weighed in with a strong endorsement.<sup>61</sup> Four former Commandants of the Coast Guard have written Senator Biden urging the Senate to approve the Convention this session of Congress.<sup>62</sup> But the opposition’s efforts to scuttle the Convention remain active, flooding the press and the Internet with arguments built on destroying the straw men they have created by misrepresentations and distortions of the terms of the Convention. As one of their spokesmen has said, “The Senate won’t ratify the Convention if it is controversial, and I’m doing everything I can to make a controversy.”<sup>63</sup>

The window of opportunity for the Senate to grant its consent to accession to the Convention in the current 110th session of Congress is small, and the Senate Foreign Relations Committee and the Senate at large both have full plates—Iraq, Iran, North Korea, Afghanistan and immigration issues. Complicating the landscape is the fact that the Committee Chairman, Senator Biden, is a presidential candidate with the first state primaries only a few months away. If the Convention cannot be brought up for a vote in this session, it is unlikely that the Senate would be inclined to address the issue in the second session of this Congress with a presidential election looming ahead in November 2008. Those who favor US accession may have to keep their hopes alive until a new Congress convenes in January 2009.

*Notes*

1. ANN L. HOLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 194 (1981).
2. BERNARD H. OXMAN, FROM COOPERATION TO CONFLICT: THE SOVIET UNION AND THE UNITED STATES AT THE THIRD U.N. CONFERENCE ON THE LAW OF THE SEA 4 (1984).
3. *Id.* at 5.
4. *Id.*
5. *Id.* at 6.
6. E-mail from Bernard H. Oxman, Richard A. Hausler Professor of Law, University of Miami School of Law (July 1, 2007) (on file with author).
7. HOLICK, *supra* note 1, at 194.
8. Econ. and Social Council Res. 1112 (XL) (Mar. 7, 1966).

9. Remarks at the Commissioning of the Research Ship *Oceanographer*, 1 PUBLIC PAPERS OF THE PRESIDENTS 722 (July 13, 1966).

10. The Pardo initiative was a two-step process. On August 17, 1967, he proposed that the General Assembly include on its agenda an item, "Declaration and Treaty Concerning the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and of the Ocean Floor, Underlying the Seas Beyond the Limits of Present National Jurisdiction, and the Use of their Resources in the Interests of Mankind." U.N. GAOR, 22nd Sess., Annex Vol. 3, Agenda item 92, at 1, U.N. Doc. A/6695 (1967). On September 21, he explained his reasons for proposing the agenda item. U.N. GAOR, 22nd Sess., Summary Records, U.N. Doc. A/BUR/SR.166, at 3 (Sept. 21, 1967) [hereinafter Summary Records].

11. U.N. GAOR, 22nd Sess., Fifth Comm., 1515th and 1516th mtgs. (Nov. 1, 1967), reprinted in H.R. 999, 90th Cong., 1st Sess., at 285 (1967). See also Louis B. Sohn, *Managing the Law of the Sea: Ambassador Pardo's Forgotten Second Idea*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 285, 287 (1998).

12. Summary Records, *supra* note 10.

13. G.A. Res. A/2340 (XXII) (Dec. 18, 1967), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/236/75/IMG/NR023675.pdf?OpenElement>.

14. HOLLICK, *supra*, note 1, at 198–201, and the citations therein.

15. *Id.* at 201.

16. *Id.* at 204–205. For a detailed discussion of the development of the US position of the law of the sea during this period, see *id.* at 190–208. See also Horace B. Robertson Jr., *A Legal Regime for the Resources of the Seabed and Subsoil of the Deep Sea: A Brewing Problem for International Lawmakers*, NAVAL WAR COLLEGE REVIEW, Oct. 1968, at 61, reprinted in READINGS IN INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1974–1977, at 457 (Richard B. Lillich & John Norton Moore eds., 1980) (Vol. 61, US Naval War College International Law Studies). (That article was initially prepared as a paper to fulfill the author's thesis requirement for the degree of Master of International Relations, George Washington University, 1968. The paper (on file with author) contains a fuller account of initiatives within the US government, especially those of Senator Claiborne Pell of Rhode Island, an early advocate of US action to take the lead in developing an international regime for the deep seabed.) See S. Res. 263, 90th Cong. (1968).

17. Statement about United States Oceans Policy, PUBLIC PAPERS OF THE PRESIDENTS 454, 455 (May 23, 1970).

18. *Id.*

19. U.N. Doc. A/AC.138/25 (Aug. 3, 1970). See Statement by John R. Stevenson, Legal Adviser, US Department of State, *Draft U.N. Convention on the International Seabed Area: U.S. Working Paper Submitted to U.N. Seabeds Committee* [hereinafter Stevenson Statement] and appended Statement by U.S. Ambassador Christopher H. Phillips, 63 DEPARTMENT OF STATE BULLETIN 209 (1970) (outlining and explaining the US working paper).

20. *Id.*

21. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter 1982 LOS Convention].

22. Statement on United States Participation in the Third United Nations Conference on the Law of the Sea, 1 PUBLIC PAPERS OF THE PRESIDENTS 92 (Jan. 29, 1982), available at <http://www.reagan.utexas.edu/archives/speeches/1982/12982b.htm>; Statement of United States Actions Concerning the Conference on the Law of the Sea, 2 PUBLIC PAPERS OF THE PRESIDENTS 911 (July 9, 1982), available at <http://www.reagan.utexas.edu/archives/speeches/1982/70982b.htm>.

23. *Law of the Sea: Hearing Before the H. Comm. on the Merchant Marine and Fisheries*, 97th Cong. 165 (Feb. 23, 1982) (statement of Ambassador James L. Malone, Special Representative of the President), quoted in Bernard H. Oxman, *The 1994 Agreement and the Convention*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 687, 688 (1994).
24. *U.S. Policy and the Law of the Sea: Hearing Before the H. Comm. on Foreign Affairs*, 97th Cong. 84 (Aug. 12, 1982) (statement of Ambassador James L. Malone, Special Representative of the President), quoted in Oxman, *supra* note 23, at 689.
25. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 41.
26. Message from the President of the United States Transmitting the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI on the United Nations Convention on the Law of the Sea, with Annex, S. TREATY DOC. NO. 103-39 (1994), available at <http://lugar.senate.gov/sfrc/pdf/presidentialmessage.pdf>.
27. Press Release, The White House, President's Statement on Advancing U.S. Interests in the World's Oceans (May 15, 2007), <http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html> [hereinafter President's Statement].
28. S. Exec. Rpt. 108-10 (2004), available at <http://lugar.senate.gov/sfrc/pdf/seareport.pdf>.
29. The opposition has never clearly identified what elements of sovereignty are given up by adherence to the Convention. Presumably it is suggesting that we could establish claims to some form of exclusive jurisdiction over certain areas of the seabed and reserve them exclusively for American exploitation, ignoring the fact no responsible government or private entity would invest the enormous amounts of capital required for a profitable seabed-mining venture unless the security of the claimed site was safe from competing claims or claim jumpers. It also ignores the fact that by terms of the Convention, the US unilateral claims to a 200 mile exclusive economic zone and the US continental shelf extension to the edge of the continental margin would be reinforced by treaty language.
30. Ambassador James L. Malone, Keynote Address Before the Center for Oceans Law and Policy Conference: Law of the Sea Policy (Jan. 6, 1983), in 9 OCEAN POLICY STUDY SERIES 11 (1985).
31. *Id.* at 13.
32. *Id.* at 16. Emphasis in original text.
33. See, e.g., *Military Implications of the United Nations Convention on the Law of the Sea: Hearings Before the S. Comm. on Armed Services*, 108th Cong. 56 (Apr. 8, 2004) (statement of Jeane J. Kirkpatrick); statement of J. William Middendorf, *id.* at 69; *United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Environment and Public Works*, 108th Cong. 19 (Mar. 23, 2004) (statement of Frank Gaffney Jr.); statement of Peter Leitner, *id.* at 24, 92, 129–45.
34. Perhaps the most detailed, articulate and scholarly defense of the Convention and refutation of the opponents' arguments is contained in the Prepared Statements of Professor John Norton Moore. *Military Implications of the United Nations Convention on the Law of the Sea*, *supra* note 33, at 81 [hereinafter Moore Prepared Statement]; *U.N. Convention on the Law of the Sea: Hearing Before the H. Comm. on International Relations*, 108th Cong. 70 (May 12, 2004).
35. 1982 LOS Convention, *supra* note 21, art. 133.
36. *Id.*, art. 1(1).
37. For a fuller discussion of the 1994 Agreement, see Oxman, *supra* note 23; Louis B. Sohn, *International Implications of the 1994 Agreement*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 696 (1994). See also statement of William H. Taft IV, Legal Adviser, Department of State, S. Exec. Rpt. 108-10, *supra* note 28, at 88, 94 [hereinafter Taft statement].

38. Letter from Herbert J. Hansell, Roberts B. Owen, Davis R. Robinson, Abraham D. Sofær, Edwin D. Williamson, Conrad K. Harper, David R. Andrews & Michael J. Matheson to John W. Warner, Chairman, Committee on Armed Services, United States Senate (Apr. 7, 2004), *reprinted in* 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 307 (2004), available at <http://www.oceanlaw.org/downloads/references/endorsements/LegalAdvisorsLetter.pdf>.
39. See Moore Prepared Statement, *supra* note 34, at 81, 89; statement of Rear Admiral William L. Schachte, US Navy (Ret.), *Military Implications of the United Nations Convention on the Law of the Sea*, *supra* note 33, at 104, 108, 110 [hereinafter Schachte Statement].
40. See Moore Prepared Statement, *supra* note 34; Schachte Statement, *supra* note 39.
41. Statements of the President, *supra* note 22.
42. 1982 LOS Convention, *supra* note 21, Part V.
43. *Id.*, art. 252.
44. See statement of Rear Admiral William L. Schachte, S. Exec. Rpt. 108-10, *supra* note 28, at 60; statement of Professor John Norton Moore, *id.* at 50.
45. See Stevenson Statement, *supra* note 19, at 210.
46. See Statement of Baker Spring, Research Fellow, National Security Policy, Heritage Foundation, *Military Implications of the United Nations Convention on the Law of the Sea*, *supra* note 33, at 44; see also Jack Goldsmith & Jeremy Rabkin, *A Treaty the Senate Should Sink*, WASHINGTON POST, July 2, 2007, at A19.
47. 1982 LOS Convention, *supra* note 21, art. 287.
48. See Message from the President, *supra* note 26, at 84–85; see also Taft statement, *supra* note 37, at 93; “Declarations under Articles 287 and 298” in the Draft Resolution of Advice and Consent Subject to Declarations and Understandings, S. Exec. Rpt. 108-10, *supra* note 28, at 17 [hereinafter Draft Resolution].
49. Message from the President, *supra* note 26, at 87; Taft statement, *supra* note 37; Draft Resolution, *supra* note 48, at 17.
50. Taft statement, *supra* note 37, at 94.
51. *Id.* See also *Current Status of the Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 103rd Cong. 51–52 (Aug. 11, 1994) (statement of Ambassador David A. Colson).
52. *Id.* at 51.
53. *Ocean Policy Priorities in the U.S.: Hearing Before the H. Subcomm. on Fisheries, Wildlife, and Oceans*, 100th Cong. 7 (Mar. 29, 2007) (statement of Admiral James. D. Watkins, US Navy (Ret.) and the Honorable Leon A. Panetta, Co-chairmen, Joint Ocean Commission Initiative), available at <http://www.jointoceanccommission.org/> (follow “Testimony” hyperlink; then “3-29-2007” hyperlink).
54. President’s Statement, *supra* note 27.
55. See, e.g., Frank Gaffney Jr., *LOST at the Helm*, WASHINGTON TIMES, May 15, 2007, at A15; Henry Lamb, *The Law of the Sea Treaty, LOST: The Damn Thing Won’t Die*, CANADA FREE PRESS, May 17, 2007, <http://canadafreepress.com/2007/lamb051607.htm>; Cliff Kincaid, *Bush-backed Law of the Sea Treaty is a Trojan Horse for International Slip and Fall Lawyers*, USASURVIVAL.ORG, Mar. 29, 2007, <http://www.usasurvival.org/docs/los.pdf>; Phyllis Schlafly, *Deep-six the Law of the Sea*, BEND WEEKLY (Oregon), May 18, 2007, available at <http://www.bendweekly.com/print/6036/html>; Cliff Kincaid, *Last Stand for American Sovereignty*, NEWSWITHVIEWS.COM, May 21, 2007, <http://www.newswithviews.com/Kincaid/cliff152.htm>; Paul M. Weyrich, “UNCLOS” or “LOST” – A Bad Idea Resurfaces, THE CONSERVATIVE VOICE, May 29, 2007, <http://www.theconservativevoice.com/article/25486.html>.

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56. Henry Lamb, *Warning: LOST Again*, WORLDNETDAILY, Jan. 29, 2005, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=42606](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=42606).
57. Convention on the Territorial Sea and Contiguous Zone art. 1(2), Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.
58. The United States has a strong current interest in the work of the Commission on the Limits of the Continental Shelf. It has a large continental shelf, approximately 14 percent of which is beyond the outer boundary of the 200 mile EEZ. Much of this lies in the Alaskan Arctic, and with the shrinking of the Arctic icecap this sector becomes increasingly important. Russia is expected soon to file a claim for a huge area extending from its northern shores to the North Pole. Statement of Professor John Norton Moore, S. Exec. Rpt. 108-10, *supra* note 28, at 50, 52.
59. 1982 LOS Convention, *supra* note 21, art. 252.
60. Informal statement of a Department of Defense representative at the Naval War College, June 10, 2007. See John D. Negroponte & Gordon England, *Reap the Bounty: U.S. should join Law of the Sea Convention*, WASHINGTON TIMES, June 13, 2007, at A17.
61. Press Release, United States Coast Guard, Statement by ADM Thad Allen, Commandant of the Coast Guard, on the Convention on the Law of the Sea (May 17, 2007), <https://www.piersystem.com/go/doc/786/156912/>.
62. Letter from Admirals Thomas H. Collins, James M. Loy, Robert E. Kramek & Paul A. Yost to Joseph Biden, Chairman, Foreign Relations Committee, United States Senate (Aug. 15, 2007), available at <http://www.oceanlaw.org/downloads/CGComm-LOS-Biden.pdf>.
63. Jeremy Rabkin, Statement at the American Enterprise Institute forum on the Law of the Sea Convention (July 17, 2007), quoted in Paul Scott, *Law of the Sea Digest*, CITIZENS FOR GLOBAL SOLUTIONS, July 23, 2007, [http://globalsolutions.org/blog/index.php/home/2007/07/23/law\\_of\\_the\\_sea\\_digest](http://globalsolutions.org/blog/index.php/home/2007/07/23/law_of_the_sea_digest).

# **PART II**

**LUNCHEON ADDRESS**



# VI

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## The Unvarnished Truth: The Debate on the Law of the Sea Convention

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William L. Schachte Jr.\*

Good afternoon. Distinguished guests, ladies and gentlemen, friends. Professor Mandsager, thank you for that kind introduction. It's nice to be introduced by someone you truly respect. It is an honor to be your speaker today. I am grateful for your gracious hospitality.

### *Background*

The Senate's consideration of US accession to the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention)<sup>1</sup> this year, as it did when the Senate last considered the Convention in 2004, has produced an amazing array of opposition arguments. Well, this is America and protecting our rights, such as freedom of speech—which of course includes the right to speak out on or participate in debates on major issues—is why many Americans have chosen to be members of our armed forces. However, when examined, the opposition arguments are basically intellectually bankrupt. Reminds me of the fellow down South who used to lament, “Broke? Man I’m so broke I can’t even pay attention.”

In fact, I couldn't resist the opportunity to express my true feelings at a forum sponsored by the Brookings Institution in September 2004. After Senator Lugar's

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opening remarks, we five panelists were given five to seven minutes each and then the floor was open for questions. Frank Gaffney asked for and was given the opportunity to speak first. I followed. I took the full five minutes and these were my opening comments:

There has been a constant drumbeat of ill-founded criticism predicting near-apocalyptic doom for the United States if it accedes to the Law of the Sea Convention. The opponents constantly argue that the Law of the Sea (LOS) Convention will cripple the U.S. Navy's ability to perform maritime missions necessary for national security, including collecting intelligence, conducting submerged transits with submarines, and preventing actions by terrorists. I am compelled to speak out against these misguided and incorrect beliefs to set the record straight. I certainly respect honest, deliberate scrutiny of this complex Convention. But, given the repeated misstatements of fact, it is hard not to conclude that there are some who are engaged in a deliberate, concerted effort to mislead the public and our government leaders on this important issue for our nation. It is bad enough to be wrong, but there is something more serious going on when people ignore facts and are consciously and purposefully wrong. Bottom line: nothing in the LOS Convention hampers, impedes, trumps or otherwise interferes with traditional naval activities we currently conduct or will conduct in the future. I sincerely want to thank the Brookings Institute [*sic*] for providing this opportunity to communicate the truth about the LOS Convention.<sup>2</sup>

You will recall that the Convention's opponents were successful in preventing a floor vote during the second session of the One Hundred Eighth Congress. It was almost unprecedented to have a treaty unanimously reported out of committee, yet fail to go to the full Senate for a vote.

As the One Hundred Tenth Senate considers the 1982 LOS Convention, a number of items have appeared in the press and online asserting the Convention is contrary to US interests.<sup>3</sup> The opponents' arguments have been aggressively countered by the Convention's supporters.<sup>4</sup>

On October 31, 2007, the Senate Foreign Relations Committee voted seventeen to four in favor of acceding to the treaty.<sup>5</sup> Its report has been sent to the full Senate for consideration.

The strongest supporters of the 1982 LOS Convention are those directly affected by it.<sup>6</sup> The arguments made by Convention opponents and the Bush administration's rebuttals from the One Hundred Eighth Senate's consideration of the Convention appear in the written statements of Department of State Legal Adviser William H. Taft before the Senate Committee on Armed Services on April 8, 2004,<sup>7</sup> before the House Committee on International Relations on May 12, 2004,<sup>8</sup> and before the Senate Select Committee on Intelligence on June 8, 2004;<sup>9</sup> and in testimony by Assistant Secretary of State John Turner before the Senate Committee of

Foreign Relations on October 21, 2003,<sup>10</sup> and before the Senate Committee on Environment and Public Works on March 23, 2004.<sup>11</sup> This year, testimony in support of the Convention was provided to the Senate Foreign Relations Committee by Deputy Secretary of State John Negroponte, Deputy Secretary of Defense Gordon England and Admiral Patrick Walsh, Vice Chief of Naval Operations, on September 27, 2007.<sup>12</sup> The Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, stated unequivocally that the Convention advances US interests during his confirmation hearings before the Senate Committee on Armed Services on July 31, 2007.<sup>13</sup>

### *Opposition Myths*

The following is a sampling of the myths regarding the Convention that opponents continue to trumpet.

**President Reagan thought the treaty was irremediably defective.<sup>14</sup>**

This is absolutely false. President Reagan expressed concerns only about Part XI's deep seabed mining regime.<sup>15</sup> In fact, he believed that Part XI could be fixed and specifically identified the elements in need of revision.<sup>16</sup> In response to those concerns, the regime has been fixed in a legally binding manner that addresses each of the US objections to the earlier regime.<sup>17</sup> The rest of the treaty was considered so favorable to US interests that, in his 1983 Ocean Policy Statement, President Reagan ordered the government to abide by and exercise the rights accorded by the non-deep-seabed provisions of the Convention.<sup>18</sup>

**US adherence to the Convention is not necessary because navigational freedoms are not threatened (and the only guarantee of free passage on the seas is the power of the US Navy).<sup>19</sup>**

Wrong! It is not true that our navigational freedoms are not threatened. There are more than one hundred illegal, excessive claims affecting vital navigational and overflight rights and freedoms. The United States has utilized diplomatic and operational challenges to resist the excessive maritime claims of other nations that interfere with US navigational rights as reflected in the Convention. But these operations entail a certain amount of risk, e.g., the Black Sea bumping incident with the former Soviet Union in 1988. Being a party to the Convention would significantly enhance our efforts to roll back these claims by, among other things, putting the United States in a far stronger position to assert our rights and affording us additional methods of resolving conflict.

**The Convention was drafted before—and without regard to—the war on terror and what the United States must do to wage it successfully.<sup>20</sup>**

An irrelevant canard. It is true that the Convention was drafted before the war on terror; however, the Convention enhances, rather than undermines, our ability to successfully wage the war on terror. The maximum maritime naval and air mobility that is assured by the Convention is essential for our military forces to operate effectively. The Convention provides the necessary stability and framework for our forces, weapons and materiel to get to the fight without hindrance—and ensures that our forces will not be hindered in the future. Accordingly, the Convention supports our war on terrorism by providing important stability for navigational freedoms and overflight. It preserves the right of the US military to use the world's oceans to meet national security requirements. It is essential that key sea and air lanes remain open as an international legal right and not be contingent upon approval from nations along the routes. A stable legal regime for the world's oceans will support global mobility for our armed forces.

**Obligatory technology transfers will equip actual or potential adversaries with sensitive and militarily useful equipment and know-how such as anti-submarine warfare technology.<sup>21</sup>**

Total bunk. No technology transfers are required by the Convention. Mandatory technology transfers were eliminated by Section 5 of the Annex to the Agreement amending Part XI of the Convention. Further, Article 302 of the Convention explicitly provides that nothing in the Convention requires a party to disclose information the disclosure of which is contrary to the essential interests of its security.

**As a non-party, the United States is allowed to search any ship that enters our exclusive economic zone (EEZ) to determine whether it could harm the United States or pollute the marine environment. Under the Convention, the US Coast Guard or others would not be able to search any ship until the United Nations is notified and approves the right to search the ship.<sup>22</sup>**

Absurdly false. Under applicable treaty law—the 1958 law of the sea conventions—as well as customary international law, no nation has the right to arbitrarily search any ship that enters its EEZ to determine whether it could harm that nation or pollute its marine environment. Nor would we want countries to have such a blanket “right,” because it would fundamentally undermine the freedom of navigation that benefits the United States more than any other nation. Thus, the description of both the status quo and the Convention’s provisions is incorrect. The Convention makes no change in our existing ability or authority to search ships entering our EEZ with regard to security or protection of the environment. One final and very

important point: under the Convention, the UN *has absolutely no role* in US military operations, such as in deciding when and where a foreign ship may be boarded.

**Other parties will reject the US “military activities” declaration as a reservation.<sup>23</sup>** A ridiculously false assertion. The US declaration is consistent with the Convention and is not a reservation. It is an option explicitly provided by Article 298 of the Convention. Other parties to the Convention that have already made such declarations exercising this option include the United Kingdom, Russia, France, Canada, Mexico, Argentina, Portugal, Denmark, Ukraine, Norway and China.

**The 1994 Agreement doesn’t even pretend to amend the Convention; it merely establishes controlling interpretive provisions.<sup>24</sup>**

Nonsense. The Convention could only have been formally “amended” if it had already entered into force. The 1994 Agreement<sup>25</sup> was negotiated as a separate agreement in order to ensure that the Convention did not enter into force with Part XI in its flawed state. The 1994 Agreement made explicit, legally binding changes to the Convention and has the same legal effect as if it were an amendment to the Convention itself.<sup>26</sup>

A letter signed by all living former Legal Advisers to the US Department of State, representing both Republican and Democrat administrations, confirms the legally binding nature of the changes to the Convention effected by the 1994 Agreement. Their letter states, “[T]he Reagan Administration’s objection to the LOS Convention, as expressed in 1982 and 1983, was limited to the deep seabed mining regime. The 1994 Implementing Agreement that revised this regime, in our opinion, satisfactorily resolved that objection and has binding legal effect in its modification of the LOS Convention.”<sup>27</sup>

**The problems identified by President Reagan in 1983 were not remedied by the 1994 Agreement relating to deep seabed mining.<sup>28</sup>**

Wrong. Each objection has been addressed. Among other things, the 1994 Agreement

- Provides for access by US industry to deep seabed minerals on the basis of non-discriminatory and reasonable terms and conditions;<sup>29</sup>
- Overhauls the decision-making rules to accord the United States critical influence, including veto power over the most important future decisions that would affect US interests and, in other cases, requires two-thirds majorities that will enable us to protect our interests by putting together small blocking minorities;<sup>30</sup> and

- Restructures the regime to comport with free-market principles, including the elimination of the earlier mandatory technology transfer provisions and all production controls.<sup>31</sup>

**The Convention gives the United Nations its first opportunity to levy taxes.<sup>32</sup>**

A ludicrously false assertion. The Convention does not provide for or authorize taxation of individuals or corporations. It does include revenue sharing provisions for oil/gas activities on the continental shelf beyond 200 miles<sup>33</sup> and administrative fees for deep seabed mining operations.<sup>34</sup> The costs are less than the royalties paid to foreign countries for drilling off their coasts and none of the revenues go to the United Nations. These minimal costs are worth it according to reliable industry representatives. (US companies applying for deep seabed mining licenses would pay the application fee directly to the Seabed Authority; no implementing legislation would be necessary.) US consent would be required for any expenditure of such revenues. With respect to deep seabed mining, because the United States is a non-party to the 1982 LOS Convention, US companies currently lack the ability to engage in such mining under US authority. Becoming a party will give our firms such ability and will open up new revenue opportunities for them when deep seabed mining becomes economically viable. The alternative is no deep seabed mining for US firms, except through other nations that are parties to the Convention.

**The Convention mandates another tribunal to adjudicate disputes.<sup>35</sup>**

The asserted authority of the tribunal is wildly inaccurate. The Convention established the International Tribunal for the Law of the Sea. However, parties are free to choose other methods of dispute settlement. The United States would choose two forms of arbitration rather than the Tribunal.

The United States would be subject to the Seabed Disputes Chamber if deep seabed mining ever takes place. The proposed Resolution of Advice and Consent makes clear that the Seabed Disputes Chamber's decisions "shall be enforceable in the territory of the United States only in accordance with procedures established by implementing legislation and that such procedures shall be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the United States."<sup>36</sup> The Chamber's authority extends only to disputes involving the mining of minerals from the deep seabed; no other activities, including operations in the water column or on the surface of the oceans, are subject to it.

**US adherence will entail history's biggest voluntary transfer of wealth and surrender of sovereignty.<sup>37</sup>**

To the contrary, the Convention enhances not only sovereignty of military ships and aircraft, but also bolsters our resource jurisdiction over a vast area off the coasts of the United States. Furthermore, under the Convention, as superseded by the 1994 Agreement, there is absolutely no transfer of wealth and no surrender of sovereignty. In fact, the Convention supports the sovereignty and sovereign rights of the United States over extensive maritime territory and natural resources off its coast, including a broad continental shelf that in many areas extends well beyond the 200 nautical mile limit, and would give us additional capacity to defend those claims against others. The mandatory technology transfer provisions of the original Convention, an element of the Convention that the United States objected to, were eliminated in the 1994 Agreement.

**The International Seabed Authority (ISA) has the power to regulate seven-tenths of the earth's surface, impose international taxes, etc.<sup>38</sup>**

Nothing could be further from the truth. The Convention addresses seven-tenths of the earth's surface; however, the ISA does not. The authority of the ISA is strictly limited to administering mining of minerals in areas of the deep seabed beyond national jurisdiction, generally more than 200 miles from the shore of any nation. At present, and in the foreseeable future, such deep seabed mining is economically unfeasible. The ISA has no other role and has no general regulatory authority over the uses of the oceans, including freedom of navigation and overflight. The ISA has no authority or ability to levy taxes.

**The United States might end up without a vote in the ISA.<sup>39</sup>**

Not possible. The Council is the main decision-making body of the ISA. The United States would have a permanent seat on the Council, by virtue of its being the State with the largest economy in terms of gross domestic product on the date of entry into force of the Convention, November 16, 1994.<sup>40</sup> This would give us a uniquely influential role on the Council, the body that matters most.

**The People's Republic of China asserts that the Convention entitles it to exclusive economic control of the waters within a 200 nautical mile radius of its artificial islands—including waters transited by the vast majority of Japanese and American oil tankers en route to and from the Persian Gulf.<sup>41</sup>**

Wrong again on both facts and law. The US government is not aware of any claims by China to a 200 mile economic zone around its artificial islands. Any claim that artificial islands generate a territorial sea or EEZ would be illegal under the

Convention. The Convention specifically provides that artificial islands do not have the status of islands and have no territorial sea or EEZ of their own.<sup>42</sup>

**Participation in the Law of the Sea Convention would render the Proliferation Security Initiative (PSI) invalid.<sup>43</sup>**

Wrong and an insult to our military leadership, all of whom strongly support the Convention. US accession to the Convention would in no way hinder our efforts under the PSI to interdict vessels suspected of engaging in the proliferation of weapons of mass destruction. The PSI Statement of Interdiction Principles requires participating countries to act consistently with national legal authorities and “relevant international law and frameworks,” which includes the law reflected in the 1982 LOS Convention.

*Concluding Remarks*

Those are the basic arguments. Before going to my predictions, I would like to stress one point; whether a party or non-party, a robust Freedom of Navigation Program must be an essential part of US oceans policy. This treaty, or any treaty, is only effective if it is implemented by action.

Predictions: I’m going to be an optimist here. Considering the favorable vote of the Senate Foreign Relations Committee, the direct support “in writing” from the President, the support of the Democratic side of the aisle, as well as support from Senators Lugar, Stevens, Warner and others, I predict the Convention will get to the floor and receive the necessary votes for advice and consent. The United States will finally join the current 155 parties to the Convention.

Having said that, and after observing the Senate maneuvering over the Immigration Bill that is now pending, something “unforeseen” from the far right might still be possible. But I’m relying on the wisdom of Winston Churchill and his statement: “You can always count on the Americans to do the right thing. Yes, you can always count on the Americans to do the right thing—after they’ve exhausted every other possibility.”

Thank you very much again.

*Notes*

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter 1982 LOS Convention].
2. Author’s notes.
3. See, e.g., Frank J. Gaffney Jr., *The U.N.’s big power grab*, WASHINGTON TIMES, Oct. 2, 2007, at A14, available at <http://washingtontimes.com/article/20071002/COMMENTARY03/>

110020010/1012/COMMENTARY%22; Frank J. Gaffney Jr., LOST Runs Silent, Runs Deep, Townhall.com, Oct. 30, 2007, <http://www.townhall.com/columnists/frankjgaffneyjr/archive.shtml>; Jeremy Rabkin, *Defeat the Law of the Sea Treaty*, WASHINGTON TIMES, Nov. 13, 2007, at A22, available at <http://www.washingtontimes.com/article/20071113/EDITORIAL/111130001/1013/editorial>; U.N. Law of Sea Treaty on Senate fast-track, WorldNetDaily, Sept. 30, 2007, [http://www.worldnetdaily.com/news/article.asp?article\\_ID=57903](http://www.worldnetdaily.com/news/article.asp?article_ID=57903); Phyllis Schlafly, Sink The Law Of The Sea Again, EagleForum.org, Sept. 26, 2007, <http://eagleforum.org/column/2007/sept07/07-09-26.html>; Doug Bandow, Bad Treaties Never Die, Rejectlost.blogspot.com, Nov. 15, 2007, <http://rejectlost.blogspot.com>.

4. Patrick Neher, *In Support of LOST*, WASHINGTON TIMES, Dec. 14, 2007, at A18; Ken Adelman, *Sea Law Turbulence*, WASHINGTON TIMES, Dec. 12, 2007, at A16, available at <http://www.washingtontimes.com/article/20071212/COMMENTARY/112120011/1012>; Letter from Michael Chertoff, Secretary, US Department of Homeland Security, to Senator Joseph Biden, Chairman, Committee on Foreign Relations (Sept. 26, 2007), available at [http://www.oceanlaw.org/downloads/HomeSec\\_Letter-27Sep07.pdf](http://www.oceanlaw.org/downloads/HomeSec_Letter-27Sep07.pdf); Letter from Joint Chiefs of Staff to Senator Joseph Biden, Chairman, Committee on Foreign Relations (June 26, 2007), available at <http://www.jag.navy.mil/documents/test24%20star%20ltr.pdf>; Letter from George Shultz to Senator Richard Lugar (June 28, 2007), available at <http://www.jag.navy.mil/documents/Shultz.pdf> [hereinafter Shultz letter]; Patrick Neher, *LOST Will Enhance Security*, WASHINGTON TIMES, Nov. 14, 2007, at A20, available at <http://www.washingtontimes.com/apps/pbcs.dll/article?AID=/20071114/EDITORIAL/111140015&template=nextpage>; Letter from Stephen Hadley, Assistant to the President for National Security Affairs, to Senator Joseph Biden, Chairman, Committee on Foreign Relations (Feb. 8, 2007), available at <http://www.jag.navy.mil/documents/HadleyLetter.pdf>.

5. S. EXEC. REP. NO. 110-9, at 9 (2007), available at [www.virginia.edu/colp/pdf/UNCLOS-Sen-Exec-Rpt-110-9.pdf](http://www.virginia.edu/colp/pdf/UNCLOS-Sen-Exec-Rpt-110-9.pdf).

6. While I have testified as a private citizen presenting the same or very similar responses to the critics of the Convention (truth is universal), I have chosen to draw basically from the testimony of Bush administration witnesses to "correct the record." See *Advice and Consent to the Law of the Sea Convention: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. (Oct. 14, 2003) (statement of William L. Schachte Jr.), available at <http://foreign.senate.gov/testimony/2003/SchachteTestimony031014.pdf>; *Military Implications of the United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Services*, 108th Cong. (Apr. 8, 2004) (statement of William L. Schachte Jr.), available at <http://armed-services.senate.gov/statemnt/2004/April/Schachte.pdf>; *Closed Hearing Before the S. Select Committee on Intelligence*, 108th Cong. (June 8, 2004) (statement of William L. Schachte Jr.) [unclassified statement available from author]. See also *The UN Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. (Sept. 27, 2007) (testimony of Gordon England, Deputy Secretary of Defense; John D. Negroponte, Deputy Secretary, US Department of State; and Admiral Patrick M. Walsh, US Navy, Vice Chief of Naval Operations), available at <http://www.senate.gov/~foreign/hearings/2007/hrg070927p.html> [hereinafter *Hearing on the Law of the Sea Convention*]. See testimony of Admiral Michael Mullen, US Navy (the Chairman of the Joint Chiefs of Staff nominee) before the Senate Committee on Armed Services (July 31, 2007), available at <http://oceanlaw.org/index.php?name=News&file=article&sid=31>.

7. Available at <http://armed-services.senate.gov/statemnt/2004/April/Taft.pdf>.

8. Available at [http://commdocs.house.gov/committees/intlrel/hfa93660.000/hfa93660\\_0.HTM](http://commdocs.house.gov/committees/intlrel/hfa93660.000/hfa93660_0.HTM).

9. S. EXEC. REP. NO. 110-9, *supra* note 5, at 34–41.

10. Available at <http://foreign.senate.gov/testimony/2003/TurnerTestimony031021.pdf>.
11. Available at [http://epw.senate.gov/hearing\\_statements.cfm?id=219509](http://epw.senate.gov/hearing_statements.cfm?id=219509).
12. Statements of all three available at *Hearing on the Law of the Sea Convention*, *supra* note 6.
13. Available at <http://armed-services.senate.gov/statemnt/2007/July/Mullen%2007-31-07.pdf>.
14. Steven Groves, Why Reagan Would Still Reject the Law of the Sea Treaty, *Heritage.org*, Oct. 24, 2007, <http://www.heritage.org/Research/InternationalOrganizations/wm1676.cfm>.
15. Statement on United States Participation in the Third United Nations Conference on the Law of the Sea, 1 PUBLIC PAPERS 92 (Jan. 29, 1982). *See also* Shultz letter, *supra* note 4.
16. *See* Statement on United States Participation in the Third United Nations Conference on the Law of the Sea, *supra* note 15.
17. Professor Oxman cataloged President Reagan's objections and the ways they were addressed in the 1994 Agreement in Bernard H. Oxman, *The 1994 Agreement and the Convention*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 687 (1994).
18. Statement on United States Oceans Policy, Mar. 10, 1983, in 1 PUBLIC PAPERS 379 (1983).
19. Doug Bandow, *Sink the Law of the Sea Treaty*, WEEKLY STANDARD, Mar. 15, 2004, at 16–17 (“the only sure guarantee of free passage on the seas is the power of the U.S. Navy”).
20. Michael D. Huckabee, *America's Priorities in the War on Terror*, FOREIGN AFFAIRS, Jan.–Feb. 2008, at 155, 155, available at <http://www.foreignaffairs.org/20080101faessay87112/michael-d-huckabee/america-s-priorities-in-the-war-on-terror.html>; Tell Congress to REJECT the Law of the Sea Treaty, RightMarch.com, Dec. 10, 2007, <http://capwiz.com/sicminc/issues/alert/?alertid=10393631>.
21. LOST Mandates Technology Transfer, RejectLost.blogspot.com, Sept. 1, 2007, <http://rejectlost.blogspot.com/2007/09/lost-mandates-technology-transfer.html>; Cliff Kincaid, Conservatives Mobilize Against Law of the Sea Treaty, HumanEvents.com, Sept. 10, 2007, <http://www.humanevents.com/article.php?print=yes&id=22292>.
22. *The United Nations Convention on the Law of the Sea—Oversight Hearing Before the S. Comm. on Environment and Public Works*, 108th Cong. (Mar. 24, 2004) (statement of Peter Leitner) (“Ratification of the Treaty would effectively gut our ability to intercept the vessels of terrorists or hostile foreign governments even if they were carrying nuclear weapons”), available at [http://epw.senate.gov/hearing\\_statements.cfm?id=219545](http://epw.senate.gov/hearing_statements.cfm?id=219545); Frank J. Gaffney Jr., statement Before *id.* (“LOST would prohibit U.S. Navy or Coast Guard vessels from intercepting, searching or seizing them”), available at [http://epw.senate.gov/hearing\\_statements.cfm?id=219549](http://epw.senate.gov/hearing_statements.cfm?id=219549); Paul M. Weyrich, Law of the Sea Treaty Threatens Sovereignty, RenewAmerica.us, Nov. 23, 2004, <http://www.renewamerica.us/columns/weyrich/041123> (“ISA [International Seabed Authority] . . . [has] the right to determine in what situations our Navy can stop a vessel”).
23. Oliver North, Law of the Sea Treaty on Fast Track to Ratification, FOXNews.com, Oct. 11, 2007, <http://www.foxnews.com/story/0,2933,301279,00.html>.
24. *The Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 100th Cong. (Oct. 4, 2007) (statement of Frank J. Gaffney Jr.) (“The 1994 Agreement Did Not Amend LOST”), available at <http://www.senate.gov/~foreign/testimony/2007/GaffneyTestimony071004.pdf>; Statement of Fred L. Smith Jr., President, Competitive Enterprise Institute, Before *id.* (“The problems of LOST have not been fixed. And, indeed, proponents do not really believe that they have been”), available at <http://www.senate.gov/~foreign/testimony/2007/SmithTestimony071004.pdf>.
25. Agreement Relating to the Implementation of Part XI of the United Nations Convention on Law of the Sea, G.A. Res. 263, U.N. GAOR, 48th Sess., 101st plen. mtg. U.N. Doc. A/RES/48/263

(Aug. 17, 1994), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N94/332/98/PDF/N9433298.pdf?OpenElement> [hereinafter 1994 Agreement].

26. Oxman, *supra* note 17; Louis B. Sohn, *International Law Implications of the 1994 Agreement*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 696 (1994); Jonathan I. Charney, *U.S. Provisional Application of the 1994 Deep Seabed Agreement*, *id.* at 705.

27. Former Legal Advisers' Letter on Accession to the Law of the Sea Convention (Apr. 17, 2004), reprinted in 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 307 (2004).

28. *Military Implications of the United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Services*, 108th Cong. (Apr. 8, 2004) (statement of Jeane J. Kirkpatrick) ("the [1994] modifications have not been major. The Treaty is fundamentally the same"), available at <http://armed-services.senate.gov/statemnt/2004/April/Kirkpatrick.pdf>.

29. *Id.*, Annex, sec. 1, para. 6(a)(iii).

30. *Id.*, Annex, sec. 3.

31. *Id.*, Annex, secs. 5, 6.

32. Thomas A. Bowden, *Deep Six the Law of the Sea*, WALL STREET JOURNAL, Nov. 20, 2007, at A18, available at [http://www.aynrand.org/site/News2?page=NewsArticle&id=16115&news\\_iv\\_ctrl=1021](http://www.aynrand.org/site/News2?page=NewsArticle&id=16115&news_iv_ctrl=1021); Smith, *supra* note 24 ("Under the Law of the Sea Treaty, taxpayers in industrialized countries will pay for the privilege of being regulated by a Third World-dominated body"); Doug Bandow, *The Law of the Sea Treaty: Turning the World's Resources Over to a Second United Nations*, IPI IDEAS, Sept. 1, 2007, [http://www.ipi.org/ipi%5CIPIPublications.nsf/PublicationLookupFullTextPDF/F9B1A41B3FF334158625736400652B15/\\$File/LawandSea.pdf?OpenElement](http://www.ipi.org/ipi%5CIPIPublications.nsf/PublicationLookupFullTextPDF/F9B1A41B3FF334158625736400652B15/$File/LawandSea.pdf?OpenElement).

33. 1982 LOS Convention, *supra* note 1, art. 82.

34. 1994 Agreement, *supra* note 25, Annex, sec. 1, para. 6(a)(ii).

35. Gaffney, *supra* note 24, at 8 ("LOST's compulsory dispute settlement"); LOST Mandates Compulsory Dispute Settlement, [Rejectlost.blogspot.org](http://rejectlost.blogspot.org), Sept. 1, 2007, <http://rejectlost.blogspot.com/2007/09/lost-mandates-compulsory-dispute.html>.

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37. Gaffney, *supra* note 24; Smith, *supra* note 24; Gaffney, *The U.N.'s big power grab*, *supra* note 3; Gaffney, *LOST Runs Silent, Runs Deep*, *supra* note 3; Rabkin, *supra* note 3; U.N. Law of Sea Treaty on Senate fast-track, *supra* note 3; Schlafly, *supra* note 3; Bandow, *supra* note 3.

38. Bandow, *supra* note 32, at 1 ("This may be the first global tax imposed on Americans without congressional approval"); Bowden, *supra* note 32; Gaffney, *The U.N.'s big power grab*, *supra* note 3 ("So why on earth would the United States Senate possibly consider putting the U.N. on steroids by assenting to its control of seven-tenths of the world's surface?").

39. Gaffney, *supra* note 22, at 1 ("Conceivably, due to membership rotation, there could be times when [the United States] might not even have a vote—to say nothing of a veto—over decisions taken by [the Seabed Authority]").

40. 1994 Agreement, *supra* note 25, Annex, sec. 3.15(a).

41. Frank J. Gaffney Jr., John Kerry's Treaty: Outsourcing Sovereignty, NATIONAL REVIEW ONLINE, Feb. 26, 2004, <http://www.nationalreview.com/gaffney/gaffney200402261356.asp>.

42. 1982 LOS Convention, *supra* note 1, art. 60(8).

43. Gaffney, *supra* note 24, at 14 (“LOST Can be Used to Limit the Proliferation Security Initiative”).

# **PART III**

**MARITIME ENFORCEMENT OF  
UN SECURITY COUNCIL RESOLUTIONS**



# VII

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## **Conflicts between United Nations Security Council Resolutions and the 1982 United Nations Convention on the Law of the Sea, and Their Possible Resolution**

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**Robin R. Churchill\***

### *Introduction*

Since 1990 the UN Security Council has adopted a number of resolutions calling on UN members to take various kinds of action that have the potential, depending on how those resolutions are interpreted, to interfere with States' navigational rights under the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention).<sup>1</sup> These resolutions, virtually all of which were explicitly adopted under Chapter VII of the UN Charter, fall into a number of different categories.

A first category is resolutions providing for the enforcement of sanctions imposed under Article 41 of the Charter. They include Resolution 221 (1966)<sup>2</sup> (paragraph 5 of which calls on the British government "to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia"); Resolution 665 (1990)<sup>3</sup> (paragraph 1 of which calls on those UN Member States deploying maritime forces in the Persian Gulf to "use

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such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation” of the economic sanctions imposed on Iraq); Resolutions 787 (1992)<sup>4</sup> (paragraph 12 of which contains similar provisions in respect to the former Yugoslavia) and 820 (1993)<sup>5</sup> (paragraphs 28 and 29 of which “prohibit all commercial maritime traffic from entering the territorial sea” of the Federal Republic of Yugoslavia and authorize States to “use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to enforce” this prohibition); Resolutions 875 (1993)<sup>6</sup> and 917 (1994)<sup>7</sup> (of which paragraphs 1 and 10, respectively, contain provisions in respect to Haiti similar to those in Resolutions 665 and 787); and Resolution 1132 (1997)<sup>8</sup> (paragraph 8 of which contains similar provisions as regards Sierra Leone).<sup>9</sup>

A second category of Security Council resolutions that have the potential to interfere with States’ navigational rights relates to the prevention of trafficking in weapons of mass destruction (WMD). Such resolutions include Resolution 1540 (2004)<sup>10</sup> (paragraphs 3(c) and 10 of which call on all States to develop effective border controls to prevent illicit trafficking in WMD and to take cooperative action to prevent such trafficking “consistent with international law”) and Resolution 1718 (2006)<sup>11</sup> (in paragraph 8(f) of which the Security Council “decides” that in order to prevent trafficking in WMD with North Korea, all UN Member States should take, “consistent with international law, cooperative action including through inspection of cargo to and from” North Korea).

A third, and related, category concerns resolutions to prevent the transfer of certain materials to particular States. Examples include Resolution 1695 (2006)<sup>12</sup> (paragraph 3 of which “requires all Member States . . . consistent with international law to . . . prevent missile and missile-related items, materials, goods and technology from being transferred” to North Korea) and Resolution 1696 (2006)<sup>13</sup> (paragraph 5 of which contains similar provisions in respect to Iran). Unlike the resolutions in the first category, the resolutions in the second and third categories do not explicitly refer to action being taken against shipping at sea. Nevertheless their wording seems broad enough to encompass such action, although in the case of Resolution 1540 its drafting history suggests otherwise.<sup>14</sup>

A fourth category of Security Council resolutions that have the potential to interfere with 1982 LOS Convention navigational rights relates to the prevention of terrorism. The main example of such resolutions is Resolution 1373 (2001),<sup>15</sup> paragraph 2(b) of which “decides” that all States shall “take the necessary steps to prevent the commission of terrorist acts.” There seems to be no reason why such steps could not include action against ships while at sea.

Last and certainly very far from least is the well-known set of Security Council resolutions authorizing States to “use all necessary means” (in other words, force) to achieve a particular goal, including Resolutions 678 (1990)<sup>16</sup> (relating to Iraq), 794 (1992)<sup>17</sup> (Somalia), 940 (1994)<sup>18</sup> (Haiti) and 1264 (1999)<sup>19</sup> (East Timor). There seems no reason why “necessary means” could not cover the use of force directed at ships at sea in addition to the use of force on land and in the air, which are both clearly covered.

This article will attempt to answer three questions arising from the above resolutions and from possible future Security Council resolutions that could interfere with navigational rights enshrined in the 1982 LOS Convention:

1. Is there in fact, or is it likely that there could be, a conflict between such UN Security Council resolutions, however interpreted, and provisions of the 1982 LOS Convention concerned with navigational rights?
2. If so, are such conflicts resolved by either the UN Charter or the Convention?
3. Would a dispute settlement body acting under Part XV of the Convention have the competence to consider and rule on the above two questions, as well as the competence to interpret relevant UN Security Council resolutions? Given the breadth and generality of some of the provisions of the resolutions quoted above, it may be essential for a 1982 LOS Convention dispute settlement body to interpret these provisions if it is going to be able to answer questions 1 and 2.<sup>20</sup>

Before answering these three questions, it is necessary to establish the legal nature of UN Security Council resolutions, in particular whether they are legally binding. Article 25 of the UN Charter provides that UN members “agree to accept and carry out the decisions of the Security Council.” It is clear, therefore, that “decisions” of the Security Council are binding on UN members. A *contrario*, any act adopted by the Security Council that is not a “decision” is not legally binding. This raises the question as to what acts adopted by the Security Council constitute “decisions” within the meaning of Article 25. The answer to this question depends primarily on the Charter provision under which an act is adopted and on its wording.<sup>21</sup> Measures adopted under Chapter VI, other than decisions to carry out an investigation under Article 34, are not “decisions” within the meaning of Article 25.<sup>22</sup> On the other hand, measures adopted by the Security Council under Chapter VII are “decisions” if it is clear from their wording that they are intended to be legally binding.<sup>23</sup> If the language used by the Council is to “decide” that something is to be done, that is clearly intended to be legally binding and is thus a “decision”

within the meaning of Article 25. The same is true if the Council “requires” or “demands” that States do something. On the other hand, if the Council “encourages” or “invites” States to do something, that appears intended not to be legally binding but more in the nature of a recommendation and thus not a “decision” within the meaning of Article 25. Some terminology is ambiguous. If the Security Council “calls upon” or “requests” States to do something, it is not always clear simply from its wording whether this is a “decision” or not. At least one writer has suggested that “calls upon” is not a decision but is of the nature of a recommendation.<sup>24</sup> However, this expression was used in the operative parts of Resolutions 665, 787 and 875, where the Security Council called upon States to enforce the sanctions that it had imposed on Iraq, the Federal Republic of Yugoslavia and Haiti, respectively, and was clearly regarded both by States and by writers as being intended to be legally binding.

***Question 1. Is It Likely or Possible That There Is or Could Be a Conflict between a UN Security Council Resolution and the 1982 LOS Convention?***

It is clear at the outset that there cannot be a conflict in the true sense—a conflict of norms—where there is incompatibility between a legally binding act (such as a treaty provision) and a non-legally binding act. Thus, there is no conflict where there is incompatibility between any act of the UN Security Council that is not a “decision” within the meaning of Article 25 of the UN Charter and the 1982 LOS Convention. Only where the Security Council resolution is a “decision” can there be, at least potentially, a conflict with the Convention. However, some such potential conflicts are avoided because of provisions either in the resolution or in the Convention.

In the case of a Security Council resolution, it may authorize or call on UN members to take action “consistent with international law” (for example, Resolution 1540 (2004),<sup>25</sup> paragraphs 3 and 10 (on the prevention of trafficking in WMD), and Resolution 1695 (2006),<sup>26</sup> paragraph 3 (concerning the transfer of missiles and related items to North Korea)). Clearly “international law” in this context includes the 1982 LOS Convention. This means that action taken by UN members under these resolutions must be consistent with the Convention and so no question of conflict will arise.

Turning now to the 1982 LOS Convention, several of its provisions stipulate that navigational rights are subject to other provisions of international law. Thus, Article 92 provides that while ships on the high seas are in principle under the exclusive jurisdiction of the flag State, this is subject to exceptions “expressly provided for in international treaties.” Likewise, Article 110, in setting out the limited

circumstances in which a warship may stop and board a foreign ship on the high seas, prefaces this with the words “except where acts of interference derive from powers conferred by treaty.” “International treaties” in Article 92 and “treaties” in Article 110 appear to include the UN Charter, as well as legally binding acts adopted thereunder, such as a Security Council resolution under Chapter VII.<sup>27</sup> Thus interference by a warship of one State with a ship of another State on the high seas (or in the exclusive economic zone (EEZ)<sup>28</sup>) pursuant to a Security Council decision under Chapter VII of the UN Charter will not be in conflict with the Convention.<sup>29</sup>

In other situations of interference with navigational rights set forth in the 1982 LOS Convention, the position may not be so clear. Suppose, for example, that a warship of State A, purportedly acting pursuant to a Security Council resolution adopted under Chapter VII of the Charter, intercepts a ship registered in State B that is exercising its right of innocent passage through State C’s territorial sea. On the face of it, the warship’s action would violate both the right of innocent passage of State B’s ship and State C’s sovereignty over its territorial sea. Under Article 2(3) of the Convention, a State exercises sovereignty over its territorial sea “subject to this convention and to other rules of international law.” Under Article 19(1) a ship’s right of innocent passage is to “take place in conformity with this convention and other rules of international law.” In each case, the “rules of international law” presumably include the Charter and legally binding acts adopted thereunder.<sup>30</sup> In the scenario just outlined, the warship of State A, and the Security Council resolution under which it is acting, would not appear to breach the Convention as far as the interference with State C’s sovereignty over its territorial sea is concerned, since such sovereignty is “subject to” other rules of international law.<sup>31</sup> The interference with State B’s ship may be different, however. Article 19(1) does not say that the right of innocent passage is “subject to” the rules of international law, but that innocent passage is to take place “in conformity with” other rules of international law. Both its wording and its context suggest that this provision is directed to the way in which a ship exercises its right of innocent passage, and could not therefore cover the acts of the warship of State A. Unless one can argue that passage in conformity with the rules of international law includes the notion that a ship in innocent passage is required to allow itself to be interfered with by a warship of a State other than the coastal State when that warship is acting under a binding Security Council resolution—and this may be a sustainable argument—there would be a conflict between the Convention and the resolution in the scenario above. There would seem to be even more likelihood of a conflict in the case of interference by a foreign warship with a ship exercising a right of transit passage through an international strait because the provisions of the Convention dealing with transit passage

do not contain any reference to such passage having to be in conformity with international law.

In practice so far there has actually been relatively little potential for conflict between Security Council resolutions and the 1982 LOS Convention, either because particular resolutions are not legally binding or because the wording of the resolution or the provision of the Convention at issue avoids conflict by making one subject to the other. Depending on how one interprets the reference to the “rules of international law” in Article 19(1) of the 1982 LOS Convention, any actual conflicts between navigational rights in the Convention and Security Council resolutions that may exist have largely been in the context of Security Council Resolution 820, which prohibited all commercial shipping from entering the territorial sea of the Federal Republic of Yugoslavia.

***Question 2. Are Conflicts between a Security Council Resolution and the 1982 LOS Convention Resolved by Either the UN Charter or the Convention?***

Where a conflict between a Security Council resolution and the 1982 LOS Convention does arise, how is it to be resolved? Does either the UN Charter or the Convention provide for its resolution? In the case of the Charter, Article 103 provides that “in the event of a conflict between the obligations of the members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Thus, the Charter prevails over any treaty that is in conflict with it, whether that treaty was concluded before or after the Charter came into force.<sup>32</sup> The phrase “obligations under the present Charter” in Article 103 includes binding decisions adopted by UN bodies under the Charter, such as decisions adopted by the Security Council under Chapter VII.<sup>33</sup> Thus, the latter will prevail over any conflicting treaty provisions.<sup>34</sup> The consequence of Article 103, therefore, is that Security Council resolutions that are legally binding will prevail over any conflicting provisions of the 1982 LOS Convention.

Although that appears to resolve the matter, for the sake of completeness one should also consider what (if anything) the 1982 LOS Convention has to say about the issue. Article 311 of the Convention addresses possible conflicts between the Convention and a range of other treaties. The latter do not explicitly include the Charter. Two provisions of Article 311 are potentially relevant to the relationship of the Charter (and Security Council resolutions) to the Convention. First, paragraph 2 provides that the Convention “shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the

performance of their obligations under this Convention.” Obviously, the Charter as such is compatible with the 1982 LOS Convention, but it is also clear that Security Council resolutions adopted under it have the potential to, and on occasions actually do, affect the enjoyment of States’ rights under the Convention. This might suggest that in such a situation the Convention would prevail over the resolution in question. However, this is negated by Article 103 of the Charter, which clearly must have priority in this situation since there was no intention on the part of the drafters of the 1982 LOS Convention to try to override or negate Article 103 of the Charter.<sup>35</sup> In any case, any apparent conflict between Article 311(2) of the Convention and Article 103 of the Charter will in practice on many occasions be avoided as a result of paragraph 5 of Article 311, which provides that Article 311 (including paragraph 2) “does not affect international agreements expressly permitted or preserved by other articles of this Convention.” It was suggested earlier that the various references to “treaties” and “international law” found in such provisions of the Convention as Articles 2(3), 19(1), 92 and 110 include the Charter and Security Council resolutions adopted thereunder. It can therefore be argued that the Charter and Security Council resolutions are permitted or preserved by the articles in question and therefore that they are not affected by the 1982 LOS Convention.

***Question 3. Would a Dispute Settlement Body Acting under Part XV of the 1982 LOS Convention Have the Competence to Consider and Rule on Questions 1 and 2 Above?***

Rather than try to answer this question in the abstract, an easier way is to consider what might happen in a hypothetical dispute. Suppose a warship of State A, purportedly acting pursuant to a Security Council resolution, stops a merchant vessel registered in State B that is exercising a right of innocent passage through the territorial sea of State C, boards it and searches it for WMD. State B then brings a case against State A before a 1982 LOS Convention dispute settlement body arguing that State A has breached its vessel’s right of innocent passage under the Convention. State A’s defense is that its actions are justified because the reference to “rules of international law” in Article 19(1) of the Convention requires State B’s vessel to be subject to searches under the Security Council resolution (compare the discussion on this point above); but if this is not the case, the actions of its warship pursuant to the resolution trump the right of innocent passage of State B’s ship by virtue of Article 103 of the Charter. Suppose that the 1982 LOS Convention dispute settlement body rejects State A’s first argument. Can it consider its alternative defense or is this beyond its jurisdiction? At first sight, the latter might indeed appear to be

the case since Article 288(1) of the Convention limits the jurisdiction of a dispute settlement body to “any dispute concerning the interpretation and application of this Convention.” A dispute settlement body under the Convention does not, therefore, have jurisdiction to hear disputes involving other treaties, such as the UN Charter and acts done pursuant to it. However, there are a number of arguments to suggest that this is an oversimplified approach to Article 288(1) and that the 1982 LOS Convention dispute settlement body could indeed consider State A’s alternative defense.

Even though the question before the dispute settlement body is whether the acts of State A that have interfered with State B’s rights under the 1982 LOS Convention are overridden by the Security Council resolution, the dispute arguably remains one related to the “application” of the Convention, namely, the alleged breach of its provisions on innocent passage. Article 293 of the Convention, dealing with applicable law, provides that a dispute settlement body having jurisdiction under Article 288(1) “shall apply this Convention and other rules of international law not incompatible with the Convention.” This provision would allow the dispute settlement body to consider the Security Council resolution since the phrase “other rules of international law not incompatible with the Convention” must include the UN Charter and legally binding acts adopted thereunder. Support for this position can be found in the judgment of the International Tribunal for the Law of the Sea in the *M/V Saiga* (No. 2) case, where, on the basis of Article 293, the Tribunal invoked the customary international law rules governing the degree of permissible force that may be used to arrest ships, to find that Guinea’s breach of the 1982 LOS Convention in illegally arresting the *Saiga* was compounded by its excessive use of force.<sup>36</sup> The Tribunal also suggested that had the necessary conditions for its application been fulfilled (which they were not), Guinea might have been able to rely on the general international law of necessity to justify its breach of the Convention.<sup>37</sup>

A second argument to support the competence of a dispute settlement body, acting pursuant to the 1982 LOS Convention, to consider State A’s alternative defense relates to Article 298(1) of the Convention. The latter provides that a State party may at any time make a declaration excepting from compulsory dispute settlement any dispute to which it is a party concerning military activities, law enforcement activities relating to its rights in the EEZ or disputes in respect to which the UN Security Council “is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.” Since this is an optional exception to the jurisdiction of a 1982 LOS Convention dispute settlement body, it presupposes that some disputes involving

action taken by the Security Council may come before a Convention dispute settlement body.<sup>38</sup>

A third argument is a policy one. If in the hypothetical dispute outlined above, the dispute settlement body could not consider State A's argument based on the superiority of the Security Council resolution over provisions of the 1982 LOS Convention, this would lead to the fragmentation of the dispute, with this point having to be dealt with (if at all) under some other dispute settlement mechanism. It is desirable on grounds of judicial economy not to fragment disputes if this can reasonably be avoided. Furthermore, if the argument about the superiority of a Security Council resolution over a Convention provision were not dealt with by another body, considerable injustice might be caused, because State A might be found to have violated the Convention without its perfectly plausible defense based on the superiority of the resolution being considered at all. Some support for the policy argument put forward here can be found in remarks made by the President of the International Tribunal for the Law of the Sea, Judge Wolfrum, in addresses to the UN General Assembly and before an Informal Meeting of Legal Advisers in 2006.<sup>39</sup> Judge Wolfrum argued, based on the deliberations of the Tribunal judges at their 2006 sessions on administrative and legal matters not connected with cases, that in a maritime boundary delimitation case the Tribunal had competence not only in respect to such delimitation but also in respect to associated disputed issues of delimitation over land and sovereignty over territory because of their close connection with the maritime delimitation. Although Judge Wolfrum did not use the expression "fragmentation of the dispute" explicitly, this position taken by the Tribunal judges seems to be based on a similar idea since President Wolfrum justified it in part on the basis of the "principle of effectiveness" which "enables the adjudicative body in question to truly fulfill its function."<sup>40</sup>

A final argument to support the competence of a 1982 LOS Convention dispute settlement body to consider State A's defense based on the superiority of the Security Council resolution is the practice of some other international courts, in particular the European Court of Human Rights. That court's jurisdiction is limited by Article 32 of the European Convention on Human Rights to "all matters concerning the interpretation and application of the Convention." Nevertheless, in a recent case the court held that it was competent to consider whether certain actions taken under the aegis of the NATO-led Kosovo Force and the UN Mission in Kosovo amounted to breaches of the Convention.<sup>41</sup> Although the Convention contains no provisions on applicable law, the court held that it could not interpret and apply the Convention "in a vacuum" but "must also take into account relevant rules of international law when examining questions concerning its jurisdiction."

Such rules include the UN Charter and Security Council resolutions adopted under Chapter VII.<sup>42</sup>

If the meaning of the Security Council resolution at issue in the above hypothetical dispute is clear, the matter is relatively straightforward. But if it is not (for example, if there is doubt as to whether the resolution is a decision within the meaning of Article 25 of the Charter or whether its terms authorize the search of foreign vessels in innocent passage), would the 1982 LOS Convention dispute settlement body have the competence to interpret the resolution? This is an important question because Security Council resolutions are often quite vague as to what action may be taken and where. Article 288(1) might suggest that a Convention dispute settlement body does not have the competence to interpret Security Council resolutions. However, there are arguments to the contrary. First, it would be illogical if a 1982 LOS Convention dispute settlement body could apply a Security Council resolution whose meaning was clear but was precluded from doing so if the meaning of the resolution was not wholly certain. In any case, the distinction between applying an apparently clear legal provision and interpreting a legal provision is not always clear-cut. Secondly, there is support for the proposition that the Convention dispute settlement body would have the competence to interpret the resolution at issue from analogous practice by the International Tribunal for the Law of the Sea. In the *Saiga No. 2* case the Tribunal had to discover and articulate the customary international law relating to the use of force in arresting ships, a not markedly different exercise from interpreting a written legal text.<sup>43</sup> Furthermore, other international courts whose jurisdictions do not cover the interpretation and application of the UN Charter and acts adopted thereunder have considered themselves competent to interpret Security Council resolutions that are relevant to determining the outcome of the case before them, e.g., the European Court of Human Rights in *Behrami v. France* and *Saramati v. France et al.*<sup>44</sup> Thirdly, to say that a 1982 LOS Convention dispute settlement body may not interpret a Security Council resolution would again lead to fragmentation of the dispute.

If there are concerns that the interpretation of Security Council resolutions should be left to the International Court of Justice, as the principal judicial organ of the United Nations, these concerns may be allayed by pointing out that the consequences of any interpretation of a Security Council resolution by a 1982 LOS Convention dispute settlement body are limited. Any interpretation would be binding only on the parties to the case, not on other UN members or on the UN Security Council itself.<sup>45</sup>

However, it would be going too far to say that a 1982 LOS Convention dispute settlement body could rule on the legality of a Security Council resolution—this would clearly exceed its jurisdiction under Article 288(1). That this is so is

supported by the practice of other courts. Thus, the European Union's Court of First Instance has taken the position, based on Articles 25, 48 and 103 of the UN Charter, as well as European Union law, that it cannot review the lawfulness of Security Council resolutions, although, curiously perhaps, it has made a limited exception in the case of possible incompatibility of Security Council resolutions with *ius cogens*.<sup>46</sup> The European Court of Human Rights has implied that it lacks the jurisdiction to question the validity of Security Council resolutions as to do so would interfere with the effective functioning of the Council under Chapter VII of the UN Charter.<sup>47</sup> Thus, it would seem that if the dispute settlement body found that the interference by State A's warship with State B's vessel fell within the terms of a legally binding Security Council resolution adopted under Chapter VII, it would have to accept that the acts of the warship overrode State B's rights under the 1982 LOS Convention. To do otherwise would not only risk interfering with the activities of the Security Council under Chapter VII but also challenge Article 103 of the UN Charter. It needs to be asked, however, whether this would be the position if the Convention dispute settlement body were the International Court of Justice. Whether the Court may review the legality of Security Council resolutions is a hotly debated topic,<sup>48</sup> but one on which it is not necessary to take a view here. Even if the Court does have such competence in general terms, it would not appear to have it where its jurisdiction in a particular case was derived from the 1982 LOS Convention, as like every other Convention dispute settlement body, its jurisdiction is confined by Article 288(1) of the Convention to disputes "concerning the interpretation and application" of the Convention.

Finally, it may be noted that a 1982 LOS Convention dispute settlement body would not be able to hear the dispute if either State A or State B had made a declaration under Article 298 excepting from compulsory dispute settlement "disputes concerning military activities" and/or disputes in respect to which the Security Council was exercising its functions under the UN Charter, and such a declaration covered the dispute between States A and B. However, statistically the chances of this are slight, as only 19 of the 155 parties to the Convention have made such declarations. Furthermore, the exception in Article 298(1)(c) may be less far-reaching than it at first sight appears. Excepted under it are "disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations" (emphasis added). In the scenario being discussed here, the exception will not apply unless there is actually a dispute between States A and B with which the Security Council is dealing. If State A is merely purportedly acting under a Security Council resolution (as is posited in the scenario here), the exception will not apply (though of course the military activities exception may).

### *Conclusions*

The aim of this article was to consider three questions. As far as the first question is concerned, whether there are in fact or are likely to be conflicts between UN Security Council resolutions and the 1982 LOS Convention (in particular, the latter's provisions dealing with navigational rights), the answer is that in most cases a conflict is or would be avoided either because of the language of the Security Council resolution (if it states that action to be taken under it should be consistent with international law) or because the situation is one where the Convention provides for the possibility of interference with shipping pursuant to Security Council resolutions. The latter is particularly the case in respect to interferences with foreign merchant shipping by warships on the high seas or in the EEZ. The most likely situation where a conflict would arise would be where there was interference with a ship while in the territorial sea by a State, other than the flag or coastal State, purportedly acting under a Security Council resolution. Where such a conflict did arise (turning to the second question), it follows from Article 103 of the UN Charter that the conflict would be resolved by the UN Security Council resolution taking priority over the Convention. The third question was whether a 1982 LOS Convention dispute settlement body would have the competence to decide a dispute involving an alleged conflict between the Convention and a UN Security Council resolution. It was argued that notwithstanding Article 288(1) of the Convention, which limits the jurisdiction of a Convention dispute settlement body to disputes "concerning the interpretation and application" of the Convention, such a body would have the competence to rule on an alleged conflict between the Convention and a UN Security Council resolution. This follows from the provisions of the Convention on applicable law, from the fact that exceptions to the jurisdiction of Convention dispute settlement bodies for disputes involving military matters or the Security Council are optional, and in order to avoid fragmentation of the dispute. For similar reasons, a 1982 LOS Convention dispute settlement body would also be competent to interpret a Security Council resolution but it could not question its validity. Support for the position put forward here is provided by the practice of other international courts.

### *Notes*

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf) [hereinafter 1982 LOS Convention]. These rights set forth in the Convention are those of innocent passage (arts. 17–32), transit passage through international straits (arts. 37–44), and freedom of navigation through the exclusive economic zone (EEZ) and the high seas (arts. 58 and 87–110).

It is generally accepted that these rights also form part of customary international law and thus are enjoyed by non-parties to the Convention, such as the United States.

2. S.C. Res. 221, UN Doc. S/RES/221(Apr. 9, 1966). The text of all Security Council resolutions referred to in this article can be found on the Council's website at <http://www.un.org/Docs/sc/>; then follow "Resolution" and year of resolution hyperlinks.

3. S.C. Res. 665, UN Doc. S/RES/665 (Aug. 18, 1990).
4. S.C. Res. 787, UN Doc. S/RES/787 (Nov. 16, 1992).
5. S.C. Res. 820, UN Doc. S/RES/820 (Apr. 12, 1993).
6. S.C. Res. 875, UN Doc. S/RES/875 (Oct. 16, 1993).
7. S.C. Res. 917, UN Doc. S/RES/917 (May 6, 1994).
8. S.C. Res. 1132, UN Doc. S/RES/1132 (Oct. 8, 1997).

9. For detailed discussion of these resolutions, see Lois E. Fielding, *Maritime Interception: Centerpiece of Economic Sanctions in the New World Order*, 53 LOUISIANA LAW REVIEW 1191 (1992–93); Rob McLaughlin, *United Nations Mandated Naval Interdiction Operations in the Territorial Sea?*, 51 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 249 (2002); Alfred H. A. Soons, *Enforcing the Economic Embargo at Sea*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 307–24 (Vera Gowlland-Debbas ed., 2001).

10. S.C. Res. 1540, UN Doc. S/RES/1540 (Apr. 28, 2004).
11. S.C. Res. 1718, UN Doc. S/RES/1718 (Oct. 14, 2006).
12. S.C. Res. 1695, UN Doc. S/RES/1695 (July 15, 2006).
13. S.C. Res. 1696, UN Doc. S/RES/1696 (July 31, 2006).

14. During the drafting of Security Council Resolution 1540, China insisted that all references to "interdiction" should be removed from the text of the resolution. See Douglas Guilfoyle, *Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force*, 56 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 69, 76–77 (2007).

15. S.C. Res. 1373, UN Doc. S/RES/1373 (Sept. 28, 2001).
16. S.C. Res. 678, UN Doc. S/RES/678 (Nov. 29, 1990).
17. S.C. Res. 794, UN Doc. S/RES/794 (Dec. 2, 1992).
18. S.C. Res. 940, UN Doc. S/RES/940 (July 31, 1994).
19. S.C. Res. 1264, UN Doc. S/RES/1264 (Sept. 15, 1999).

20. One might also ask whether other dispute settlement bodies (such as the International Court of Justice when not acting as a 1982 LOS Convention dispute settlement body) would have such competence, but such an inquiry falls outside the scope of this article. Note also that this article is concerned only with the possible *competence* of an LOS Convention dispute settlement body to interpret UN Security Council resolutions, not with *how* it would interpret such resolutions if it had the competence to do so.

21. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 457 (Bruno Simma ed., 2d ed. 2002).

22. *Id.*

23. *Id.*

24. Michael Byers, *Policing the High Sea: The Proliferation Security Initiative*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 526, 532 (2004).

25. *Supra* note 10.

26. *Supra* note 12.

27. This is assumed or implied by several writers, e.g., Byers, *supra* note 24, at 531 and Angelos Syrigos, *Developments on Interdiction of Vessels on the High Seas*, in UNRESOLVED ISSUES AND NEW CHALLENGES TO THE LAW OF THE SEA 149, 178 (Anastasia Strati, Maria Gavouneli & Nikolaos Skourtos eds., 2006). The authoritative six-volume UNITED NATIONS CONVENTION

ON THE LAW OF THE SEA 1982: A COMMENTARY (Myron H. Nordquist, Shabtai Rosenne & Louis Sohn eds., 1985) [hereinafter Nordquist et al.] does not consider this issue.

28. Articles 92 and 110 of the 1982 LOS Convention apply in the EEZ by virtue of Article 58(2).

29. Although if a Security Council resolution calls for action taken by a warship to be “consistent with international law,” a warship will not be able to interfere with a foreign civilian ship unless the action taken is consistent with the explicit provisions of the 1982 LOS Convention permitting interference by warships with foreign merchant ships on the high seas (as opposed to action taken under other treaties referred to in Articles 92 and 110). If this were not so, there would be scope for a completely circular argument.

30. This is argued by McLaughlin, *supra* note 9, at 270.

31. This view is, however, implicitly rejected by Soons, who argues that measures under a Security Council resolution may only be taken in the territorial sea with the consent of the coastal State. See Soons, *supra* note 9, at 323. The opposite position is taken by McLaughlin, *supra* note 9, at 272–77.

32. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 21, at 1297–98.

33. *Id.* at 1295–96.

34. *Id.* at 1295–96 and 1300. *See also* Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.) (Provisional Measures), 1992 ICJ REP. 3, para. 39 (Apr. 14), available at <http://www.icj-cij.org/docket/files/89/7213.pdf>.

35. Compare Article 30 of the Vienna Convention on the Law of Treaties and the International Law Commission’s commentary on its draft treaty article that eventually became Article 30 in II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 214–16 (1966).

36. M/V Saiga (No. 2) (St. Vincent v. Guinea), 120 I.L.R. 143, paras. 155–59 (Int’l Trib. L. of the Sea 1999), 38 INTERNATIONAL LEGAL MATERIALS 1323 (1999), available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (then Proceedings and Judgments, then List of Cases).

37. *Id.*, paras. 132–35.

38. But compare Nordquist et al., *supra* note 27, Vol. V, at 138, which argues that the purpose of the exception in Article 298(1)(c) is to prevent a conflict between any dispute settlement proceedings under the 1982 LOS Convention and any action the Security Council is taking to maintain international peace and security. However, with great respect to the learned editors, this argument does not appear to be correct. The point they make would only hold true if Article 298(1)(c) were a general exception, not an optional exception.

39. Rüdiger Wolfrum, President, International Tribunal for the Law of the Sea, Statement to the General Assembly of the United Nations paras. 5–8 (Dec. 8, 2006), [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (then follow “News” hyperlink; then follow “Statements of the President” hyperlink). *See also* Rüdiger Wolfrum, Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs 3–7 (Oct. 23, 2006), available at *id.*

40. Statement by President Wolfrum to the General Assembly, *supra* note 39, para. 7.

41. Decision on admissibility of the Grand Chamber of the European Court of Human Rights in Behrami v. France and Saramati v. France et al. para. 122 (May 31, 2007), available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=62605&sessionId=10475686&skin=hudoc-en&attachment=true>.

42. *Id.*

43. *Supra* note 36, para. 156.

44. *Supra* note 41, paras. 123–43. However, the Court did say that it was “not its role to seek to define *authoritatively* the meaning of provisions of the UN Charter and other international instruments” (para. 122, emphasis added).

45. See 1982 LOS Convention, *supra* note 1, art. 296(2). Concerns should also be allayed by the approach of the European Court of Human Rights outlined in the previous note, where the Court stressed that it was not giving an authoritative interpretation.

46. See Case no. T-306/1, Yusuf v. Council and Commission, [2005] II-E.C.R. 3533, paras. 272–77. The Court has maintained this position in later cases: see, e.g., Case T-315/01, Kadi v. Council, [2005] II-E.C.R. 33649, paras. 217–31 and Case T-253/02, Ayadi v. Council, [2006] II-E.C.R. 2139, para. 116. *Kadi* has been appealed from the Court of First Instance to the Court of Justice (as Case C-402/05). As of September 20, 2007 the Court had not given its judgment. In none of the cases did the Court of First Instance find any breach of the rules of *ius cogens*.

47. Behrami v. France and Saramati v. France et al., *supra* note 41, para. 149.

48. See, e.g., Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 309 (1997); Vera Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 643 (1994); Geoffrey R. Watson, *Constitutionalism, Judicial Review and the World Court*, 34 HARVARD INTERNATIONAL LAW JOURNAL 1 (1993).



# PART IV

## LAW OF ARMED CONFLICT



# VIII

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## Starting from Here

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Ashley S. Deeks\*

### *I. Introduction*

Professor Garraway and the organizers of this panel asked me to address a piece by Professor Adam Roberts entitled “Detainees, Torture, and Incompetence in the ‘War on Terror.’”<sup>1</sup> As the title indicates, the piece is highly critical of US actions over the past six years, and uses a review of three different books as a launch pad for its arguments. In brief, Professor Roberts takes a largely retrospective look at US detention and interrogation policies since September 11, 2001, arguing that a number of US decisions along the way led to the abuses at Abu Ghraib. He recognizes that it is complicated to apply the law of war to certain individuals fighting US forces in different conflicts, but he concludes that the President’s decision to treat them “humanely” in 2002 did not provide a clear legal framework and charges the Bush Administration with both bad intentions and incompetence. Professor Roberts discusses the legal and policy confusion that currently exists in Afghanistan among the International Security Assistance Force (ISAF) and the government of Afghanistan related to detainee treatment, and proposes that NATO establish rules for treatment of detainees who are not entitled to prisoner of war status. Finally, he reflects the often-heard concern about a perceived threat to US separation of powers principles and concludes that the resort by the United

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States to a “war on terror” paradigm leaves quite a bit to be desired, even in the wake of all of the changes the US government has put in place since September 11.

By way of response, I will spend my time discussing three issues: where US law and policy currently stand in the three conflicts the United States is fighting, the processes by which we arrived at our current positions, and how we might address some of the ongoing legal and operational confusion in Afghanistan among NATO allies. In focusing on the current state of US law and policy, I do not mean to suggest that several still-unresolved debates about the applicability of the Geneva Conventions—and of the war paradigm to our struggle with al Qaeda more generally—are irrelevant. But to move this multiyear dialogue forward, I think it is important to use the current state of play as the jumping-off point, whatever one may think of the decisions that the United States made in the immediate aftermath of September 11, 2001.

Before I dive in, I would like to say something about the abuses of detainees described in the books that Adam Roberts has reviewed. Like many in the US government, including the military itself, I will not and cannot defend that abuse. Events like Abu Ghraib have been devastating to the reputation of the United States, especially in European and Arab States. Professor Roberts raises a number of arguments about the conflicts in Iraq and Afghanistan and with al Qaeda with which I do not agree, and which I look forward to addressing. But I wanted to make clear up front that detainee abuse warrants no defense.

## *II. Where We Are Now—A Snapshot*

The State Department’s Legal Adviser, John Bellinger, spent a week in January serving as a guest blogger on Opinio Juris, a website devoted to international law and politics. He posted pieces on Common Article 3, unlawful belligerency and the US conflict with al Qaeda, among other topics.<sup>2</sup> Professor Garraway served as a guest respondent and opened his post with an old Irish saying. The saying involves a foreigner who asks an Irishman for directions from his current location to the nearest town. The Irishman tells him, “Well, I wouldn’t start from here!”<sup>3</sup> But “here” is precisely where I would like to start. As I noted, Professor Roberts concludes his review with an assertion that the United States continues to rely on flawed structures and rules to deal with its conflict with al Qaeda, and bemoans where the United States has ended up in 2007. To evaluate this conclusion, let’s take a snapshot of where we are right now, putting aside the various legal developments that have gotten us to this point.

Because different legal paradigms apply to US conflicts in Iraq and Afghanistan and with al Qaeda, I will treat each of them separately.

## **A. Afghanistan**

ISAF is operating in Afghanistan under (most recently) UN Security Council Resolution 1707, a Chapter VII resolution that authorizes member States participating in ISAF to “take all necessary measures to fulfil its mandate.”<sup>4</sup> The United States takes part in ISAF and also continues to lead a coalition called Operation Enduring Freedom (OEF), the force that intervened in Afghanistan in November 2001 after the United States decided to respond in self-defense following the September 11 attacks. The United States has not formally revisited its view that the conflict in Afghanistan is an international armed conflict. The argument that it remains an international armed conflict is based on the fact that the US government and the coalition forces that are part of ISAF and OEF continue to fight the same entities that OEF began to fight in 2001, at which time it clearly was an international armed conflict between the United States and the Taliban.

In this ongoing conflict, the United States applies the rules on targeting appropriate to international armed conflict—most notably, distinction and proportionality, as well as limitations on the use of certain weapons. Professor Roberts acknowledged US targeting rules in a talk he gave at the Brookings Institution in 2002, where he stated, “In the conduct of the air war [in Afghanistan], as in Iraq in ’91 and as also in Serbia in ’99, the United States clearly accepted the relevance and indeed value of the rules restricting targeting to militarily significant targets and I think that needs to be frankly and honestly recognized.”<sup>5</sup> US Department of Defense (DoD) policy, as reflected in the DoD directive on the Law of War Program, is that

members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations, and that the law of war obligations of the United States are observed and enforced by the DoD Components and DoD contractors assigned to or accompanying deployed Armed Forces.<sup>6</sup>

The Directive defines “the law of war” as encompassing “all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.” This reflects a decision by the US military that, as a general matter, applying the rules of international armed conflict to all conflicts however characterized (1) is the right thing to do as a moral and humanitarian matter and (2) gives the military a single standard to which to train.

The US processing and treatment of detainees in Afghanistan is governed by several laws and policies. To ensure that we are detaining only those people who

pose a security threat, we have established status review processes (just as we have in Iraq and at Guantanamo). The first review takes place at the time of capture to determine if the person being detained is an enemy combatant. The second review occurs usually within seventy-five days and in no event more than a hundred days of the individual's coming into DoD custody. The review is based on all reasonably available and relevant information. A detainee's status determination may be subject to further review if additional information comes to light. The combatant commander may interview witnesses and/or convene a panel of commissioned officers to make a recommendation to him. That commander must review the detainee's status on an annual basis, although he has tended to do so every six months. The Review Board also nominates certain Afghan detainees for entry into Afghanistan's reconciliation program. The government of Afghanistan then vets the nominees and selects some to return to their village elders to be reintegrated.<sup>7</sup>

We also have established clear treatment rules. First, the Detainee Treatment Act of 2005 (DTA) makes clear that no detainee in US custody or control, regardless of where he is held or by which US entity, may be subjected to cruel, inhuman or degrading treatment,<sup>8</sup> as those terms are understood in the US reservations to the Convention Against Torture (CAT).<sup>9</sup> Second, the DoD detainee directive issued in September 2006 provides that "all detainees shall be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy."<sup>10</sup> The latter further states that all persons subject to the Directive shall apply at a minimum the standards articulated in Common Article 3 of the 1949 Geneva Conventions without regard to a detainee's legal status. The Directive also requires that detainees not be subjected to public curiosity, reprisals, medical or scientific experiments, or sensory deprivation. And it states that all persons in DoD control will be provided with prisoner of war protections until a competent authority determines some other legal status. Some have expressed concern that the rules in the Detainee Directive are policy protections, not legal protections. But soldiers who mistreat detainees can be prosecuted under the Uniform Code of Military Justice (UCMJ).

Finally, interrogations of individuals in DoD custody, wherever held, are governed by the Army Field Manual on Human Intelligence Collector Operations, which is publicly available, and which expressly prohibits a number of interrogation techniques, including using military working dogs, inducing hypothermia or heat injury, applying physical pain, and placing hoods or sacks over the eyes of detainees.<sup>11</sup>

Does all this mean that the conflict in Afghanistan no longer poses hard legal, policy or tactical questions? It does not. These are the US rules, but thirty-seven nations contribute to ISAF, and each contingent operates within a different legal framework. The contributing member States have different views about what type

of conflict exists in Afghanistan; some question whether an armed conflict exists at all. I will address lingering complications about the situation in Afghanistan later in this article.

## **B. Iraq**

The activities of the Multi-National Force–Iraq (MNF-I) currently are governed by a UN Security Council resolution issued pursuant to Chapter VII. Under Resolution 1546, which the Security Council adopted unanimously on June 8, 2004, the mandate of MNF-I is “to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters [from Secretary of State Powell and then–Iraqi Prime Minister Ayad Allawi] annexed to this resolution.”<sup>12</sup> The annexed letters describe a broad range of tasks that MNF-I may undertake to counter “ongoing security threats,” including “internment where this is necessary for imperative reasons of security.”<sup>13</sup> The letter from Secretary Powell states that the “forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.”<sup>14</sup>

Security Council Resolution 1546 required review of the MNF-I mandate within twelve months. Subsequent resolutions have extended this authority temporally—most recently Resolution 1723, which extends the Resolution 1546 mandate until December 2007. Resolution 1723 affirms the importance for all forces promoting security and stability in Iraq to act in accordance with the law of armed conflict, and the annexed letter from Secretary Rice states that the forces that make up MNF-I remain committed to acting consistently with their obligations and rights under international law, including the law of armed conflict.<sup>15</sup>

The detention standard contained in Resolution 1546 (“imperative reasons of security”) is drawn directly from Article 78 of the Fourth Geneva Convention,<sup>16</sup> and was included in the annexed letters to indicate that the same basis for detentions that coalition forces applied before June 28, 2004 would continue to apply after governing authority was transferred to the sovereign government of Iraq. Domestic Iraqi law (in the form of CPA Memorandum No. 3<sup>17</sup>) provides detailed requirements for the conditions and procedures for security internment, including review of detention within seven days, as well as further periodic reviews. These periodic reviews occur in the form of the Combined Review and Release Board (CRRB), a majority-Iraqi board that assesses the threat posed by each detainee.<sup>18</sup> Memorandum No. 3 states that the operation, condition and standards of any internment facility established by MNF-I shall be in accordance with the Fourth Geneva Convention, Part III, Section IV.<sup>19</sup> (This includes requirements to provide internees with food, water, clothing and medical attention, and give them the

ability to hold religious services, engage in physical exercise, and send and receive letters.) Memorandum No. 3 requires MNF-I to release individuals from security internment or transfer them to the Iraqi criminal justice system no later than eighteen months from the date of detention, unless further detention is approved by the Joint Detention Committee, which is staffed by senior officials.<sup>20</sup> The CPA Memorandum also provides for guaranteed International Committee of the Red Cross (ICRC) access to internees.<sup>21</sup>

To break my own rule and dive backward into history, I want to correct misimpressions about whether the United States as a government ever asserted that the Geneva Conventions did not apply to its conflict with the government of Iraq in 2003 and the subsequent occupation of Iraq. Professor Roberts refers in his review of Mark Danner's book *Torture and Truth* to an excerpt of an e-mail written in mid-August 2003 from a captain in military intelligence in Iraq.<sup>22</sup> That e-mail suggests that the captain believed that he could apply different rules of engagement and interrogation techniques to "unlawful enemy combatants" detained in Iraq. Danner also cites an effort by Lieutenant General Ricardo Sanchez, then-Commander MNF-I, to change the legal status of some of those detained to "unlawful enemy combatants";<sup>23</sup> however, General Sanchez did not have the authority to make that determination. Indeed, this was not and did not become US policy. In mid-2004, then-Secretary of Defense Donald Rumsfeld stated, "Iraq's a nation. The United States is a nation. The Geneva Conventions applied. They have applied every single day from the outset."<sup>24</sup>

Similarly, in his commentary *The Torture Memos*,<sup>25</sup> Josh Dratel fails to distinguish between the different rules that apply to Afghanistan, Guantanamo and Iraq; he is not correct when he asserts that the United States desired to abrogate the Geneva Conventions with respect to the treatment of persons seized in the context of armed hostilities in Iraq. The Geneva Conventions applied directly to that conflict up to the end of occupation on June 28, 2004, and continued to apply—as the Conventions require—to any individual who remained detained as a prisoner of war or protected person. The Security Council resolutions, the annexed letters referring to MNF-I compliance with the laws of war and CPA Memorandum No. 3 now provide the governing rules for MNF-I, and US laws such as the Detainee Treatment Act<sup>26</sup> and the War Crimes Act<sup>27</sup> provide additional rules for the US contingent of MNF-I.

### C. Conflict with al Qaeda

The United States is aware that many States and scholars continue to be skeptical that a State can be in an armed conflict with a non-State actor primarily outside that State's territory. However, the United States, for reasons the State Department

Legal Adviser has set forth publicly in some detail, continues to believe that such a conflict can and does exist. The US Supreme Court has supported that view, most recently in *Hamdan v. Rumsfeld*.<sup>28</sup> In the wake of that opinion, the protections of Common Article 3 apply to all members of al Qaeda detained in that conflict. Those al Qaeda members we detain in Afghanistan and Iraq are subject to the detention and review provisions I have already described. The treatment of al Qaeda members detained at Guantanamo is governed by the DTA and the Army intelligence collection manual.<sup>29</sup> (All of the detainees there are in DoD custody.) Further, because the Supreme Court has held that our conflict with al Qaeda is a non-international armed conflict, the Military Commissions Act (MCA)<sup>30</sup> provisions that criminalize violations of most provisions of Common Article 3, including torture, cruel treatment, intentionally causing serious bodily injury, rape and mutilation, would apply to those who mistreat al Qaeda detainees. The ICRC has access to everyone held at Guantanamo.

The detention review process for individuals held at Guantanamo, many of whom are associated with al Qaeda, is somewhat different from review processes in Iraq and Afghanistan. I assume that the readers are familiar with the Combatant Status Review Tribunals (CSRTs), by which the United States determines whether these individuals are in fact enemy combatants. As recently updated in the MCA, detainees may appeal their CSRT determination to a federal civilian court, the DC Circuit Court of Appeals. That Court, in the *Bismullah v. Gates* and *Parhat v. Gates* cases, currently is considering the evidentiary standards by which it will review CSRT decisions.<sup>31</sup> There is another process by which the United States reviews ongoing detention in Guantanamo: when the CSRT upholds a detainee's status as an enemy combatant and the United States does not intend to prosecute the detainee in a military commission, the detainee receives an annual review by an Administrative Review Board (ARB), which assesses whether he continues to pose a serious security threat to the United States. Hundreds of individuals have been released from Guantanamo since it opened, under the CSRT and ARB processes.

These processes are more detailed and more regularized than the Article 5 tribunals that the Third Geneva Convention delineates for cases of doubt regarding prisoner-of-war status. This is so because we are trying to balance—on the one hand—the fact that the law of war recognizes that a State can detain enemy combatants fighting against it until the end of the conflict with—on the other hand—an acknowledgment that the end of this conflict may be a long way off. The United States is aware of concerns about indefinite detention that flow from the fact that this conflict is of indefinite length and has taken these steps so that we are not holding anyone longer than necessary.

## D. Hard Questions

This is where the law, rules and procedures have ended up in mid-2007. I will leave it for others to discuss whether or how Abu Ghraib might have been avoided. But in any case it should be clear that these issues are hard, and getting it right has taken some trial and error. We are not the first government to have grappled with difficult questions at the beginning of a period of violence and terrorist attacks, and we will not be the last. Professor Roberts has described elsewhere the fact that the United Kingdom initially ignored international standards of treatment in Northern Ireland, which “led them into terrible trouble.”<sup>32</sup> In fact, the United Kingdom in the initial, militarized phase of the “Troubles” occasionally used “war talk,” although, unlike the United States, the government generally did not characterize the fighting as an armed conflict in the legal sense.<sup>33</sup> The UK government resorted to detention without charge and interrogation techniques that the European Court of Human Rights later deemed to violate the European Convention on Human Rights (ECHR). Professor Roberts makes a fair point about the lessons of history in his book review: any State fighting a non-State actor, including the United States, would be well served to pay attention to the examples of the United Kingdom in Ireland and the French in Algeria. I was not working on these issues at the time, but I expect that there was a strong belief that an attack by nineteen terrorists that killed over three thousand people in one day lacked historical precedent in key ways. Even Professor Roberts recognizes that it was not obvious how to apply existing laws and rules to this type of non-State actor.

If application of law of war rules to the conflict with al Qaeda were easy, we would not see so many people—in foreign governments, non-governmental organizations and the academy—hold so many different views on how to treat this conflict. Some say it is not an armed conflict, so the United States should have used law enforcement measures to quash al Qaeda after the 9/11 attacks. Others say that there is an armed conflict in Afghanistan, but that a State cannot be in an armed conflict with a non-State actor outside its territory without also being in an armed conflict with the State in which the non-State actor is operating. Yet others acknowledge that a State can be in an extraterritorial armed conflict with a non-State actor when hostilities between those groups meet the threshold level of violence that constitutes an armed conflict. The US government has explained elsewhere why exclusive reliance on a law enforcement paradigm was not possible, and described how the UN Security Council and NATO have recognized that non-State actors can engage in armed attacks against States at a level to trigger that State’s right of self-defense. But we recognize that others do not agree.

Even the more traditional conflicts are complicated. The Geneva Conventions provide rules for a three-stage process: armed conflict between States, occupation

by one State of the other State and peace. But what happens when, as in Iraq, armed conflict continues after occupation ends? What is the status of the many different conflicts in Iraq? Or in Afghanistan, where a new government took power less than a year after the fighting began, but the conflict between the United States and the Taliban continues? If the Afghan conflict has switched from international to non-international, what does that mean for those detained in the international phase of the conflict? Does it matter for allies in a coalition with a host government how that host characterizes the violence? Can Chapter VII resolutions render some of these questions moot? These are not easy questions, and we continue to work with our allies to find good answers.

### ***III. How We Got Here—The US System***

With regard to the United States and the three armed conflicts I have discussed, many look at the glass as still half-empty. This seems to be due at least in part to the suspicion about the United States that the last five years has engendered among legal scholars, European allies and human rights advocates. These views are colored by abuses in Guantanamo and Abu Ghraib, by objections to the CIA interrogation program and undisclosed detention facilities overseas, and concern about the use of renditions. But one may also look at the current state of law and practice as a glass half-full, where the United States has built on the decisions made in 2001–02 to move to a clear, robust framework for treatment, where everyone knows the rules. In addition to assessing the substance of the current rules, I also want to talk a bit about the process by which we arrived “here,” because that process is another reason to be optimistic about the United States.

We arrived “here” in 2007 as the result of vigorous debate and activity within each of our three branches of government. The executive branch established a number of detainee policies related to the conflict with al Qaeda and the Taliban in Afghanistan and set up military commissions to try those suspected of war crimes and related offenses. In 2001, Congress passed the Authorization to Use Military Force,<sup>34</sup> and later enacted the Detainee Treatment Act and the Military Commissions Act. The federal courts have opined on several of these executive decisions about detainee policies and military commissions, and on the MCA. This, in my view, speaks to the strength of the US constitutional system. Professor Roberts expresses a sense that our bedrock separation of powers principles are threatened and suggests that the executive branch has dominated the decision making. Consider, however, recent comments by Professor Neil Katyal, who argued the *Hamdan* case in the Supreme Court on behalf of the detainee. He states, “I believe that the *Hamdan* decision—which invalidated the President’s system of military

commissions—represents a historic victory for our constitutional process, and, in particular, the role of the United States Congress and federal judiciary in our tripartite system of government.”<sup>35</sup> He also stated:

[A]s a student of history, I know it’s hard for the Supreme Court in a time of armed conflict to rebuke the President . . . And here the Administration has managed to [lose a case during armed conflict] several times . . . [The Department of Justice] said . . . [detainees] won’t have habeas corpus rights. Well, the Supreme Court said no in the *Rasul* case. The Administration said that U.S. citizens can be held indefinitely incommunicado. The Supreme Court said no in *Hamdi*. The Administration said, you can have military commission [*sic*] and try these people. The Supreme Court said no in *Hamdan*.<sup>36</sup>

The justices themselves seem confident that our separation of powers is healthy. In Justice Breyer’s concurring opinion in *Hamdan*, he writes that the Court’s conclusion “ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’”<sup>37</sup> He further describes the majority opinion as keeping “faith in those democratic means” necessarily implicit in the Constitution’s tripartite structure. These statements recall Justice Souter’s concurrence in *Hamdi*, in which he stated, “For reasons of inescapable human nature, the branch of government asked to counter a serious threat is not the branch on which to rest the Nation’s reliance in striking the balance between the will to win and the cost in liberty on the way to victory . . .”<sup>38</sup>

Many, including Professor Roberts, might have wished for us to get to this place in the first instance—to get it right immediately after September 2001, with cool heads and a clear understanding of the lessons of history. It would have saved years in litigation, permitted the United States to try detainees accused of war crimes much faster and avoided significant tension with European allies—but we did not develop on September 12 all of the processes and laws we have in place now. It is important to recognize, however, that the Supreme Court has confirmed several of the Administration’s basic legal positions with respect to its detention policies. It has confirmed that the United States is in a state of armed conflict with al Qaeda. It has confirmed that the law of war, and in particular Common Article 3 of the Geneva Conventions, applies to that conflict.

More fine-tuning is likely to follow because there are several important cases pending or on appeal in our courts. I already mentioned the *Parhat* case, where the DC Circuit will decide whether it can look to documents beyond those contained in a detainee’s CSRT record to determine whether to uphold the CSRT determination. A panel of the Fourth Circuit recently decided the *Al Marri* case.<sup>39</sup> In 2003, the United States detained al Marri as an enemy combatant; at the time of al

Marri's detention he resided in the United States. (He has been held in a brig in South Carolina since that time.) The United States agreed that the detainee had constitutional rights, including a right to habeas corpus, but argued that the Military Commissions Act applied to him, and that Congress in the MCA had created an adequate and effective substitute by which al Marri could contest his detention. The Fourth Circuit panel held that the Military Commissions Act did not apply to al Marri; that the Court therefore had jurisdiction over his habeas corpus claim; that al Marri had constitutional due process rights; and that, despite the President's determination in 2003 that al Marri was an enemy combatant closely associated with al Qaeda, the United States could not detain al Marri as an enemy combatant because it had not properly determined that he (1) was a citizen or member of an armed force at war with the United States, (2) was seized on or near a battlefield on which an armed conflict with the United States was taking place, (3) was in Afghanistan during the armed conflict there, or (4) directly participated in hostilities against the United States or its allies.<sup>40</sup> The Court granted al Marri habeas relief, while noting that the US government was free to prosecute him for criminal offenses.<sup>41</sup> The United States has appealed this decision, seeking rehearing *en banc*.

Another court will consider whether Majid Khan, one of the fourteen detainees brought to Guantanamo Bay in September 2006 and someone to whom the US government previously had granted asylum, has a constitutional right to habeas corpus. And as military commissions get under way, we should expect to see appeals of final commission decisions to the DC Circuit, which will need to interpret the standards of review contained in the DTA, as amended by the MCA. And it is clear, even now, that the military judges are acting independently. In the *Khadr* and *Hamdan* cases, the two military judges dismissed the prosecution cases without prejudice. The basis for their decisions was that the CSRTs had not determined that the accused were "unlawful" enemy combatants (a prerequisite status for trial by military commission), but rather that they simply were enemy combatants. It seems safe to say that we have not seen the last of any of the three branches as we attempt to "strik[e] the balance between the will to win and the cost in liberty on the way to victory."

#### **IV. Lingering Confusion—Afghanistan**

Just because the US government has a clear set of rules for detention in Afghanistan does not mean that we are working seamlessly with allies that have different rules. Professor Roberts flags the "precious little uniformity" and "ongoing policy confusion" in Afghanistan. This is particularly true on detainee issues: some States are

reluctant to detain combatants at all, other States hand detainees over quickly to the government of Afghanistan and yet other States choose not to transfer all of their detainees to the Afghans. Why is this the case, and can we move toward greater harmony?

### A. Different Views of the Conflict

One reason that contributing States approach detainee treatment differently in Afghanistan is that they take different views of the legal nature of the situation there. There are four possible positions: that it is an international armed conflict; that it is a non-international armed conflict; that it is not an armed conflict at all, and thus that ISAF is engaged in security or peacekeeping operations; and that, depending on the level of hostilities, it is at times an armed conflict and at times a security operation.

As I mentioned earlier, the argument that it is an international armed conflict flows from the idea that the conflict is very similar to the conflict that began in November 2001 in Operation Enduring Freedom and that the initial conflict has continued without interruption between the same parties. Under this theory, the right to self-defense continues, the consent of the government of Afghanistan to troop presence is important but not necessary, and individuals detained in the international armed conflict may continue to be detained.<sup>42</sup> It is not clear whether the *Hamdan* decision, which deemed at least the al Qaeda part of the conflict non-international, affects the US view of the status of the conflict in Afghanistan.

The argument that it is a non-international armed conflict flows from a belief that, as of June 2002, when the Karzai government took power, the conflict in Afghanistan evolved away from a conflict between two States (the classical conflict identified in Common Article 2 of the Geneva Conventions) and became a conflict between the new Afghan government and countries supporting it on the one hand, and Taliban and al Qaeda forces on the other. Thus, the conflict resembles an internationalized non-international armed conflict of the type that Hans-Peter Gasser described in 1983.<sup>43</sup> The ICRC takes this view, and asserts that Common Article 3, customary international law applicable in non-international armed conflicts and Afghan human rights laws apply to the conflict.<sup>44</sup> Canada presumably also takes this view: although it is treating its detainees in Afghanistan consistent with the Third Geneva Convention, it appears to be doing so as a matter of policy, not law. However, the fact that it is relying on a core law of war treaty for detention guidance suggests that it views the situation as an armed conflict.<sup>45</sup>

Third, the German government may not believe that it is an armed conflict at all. German documents describing its role in Afghanistan refer only to stability operations—the documents make no reference to armed conflict.<sup>46</sup> This seems

surprising, given the level of violence, numbers of troops killed and widespread use of military responses around the country to suppress the Taliban. Finally, at least one State seems to take the view that the situation fluctuates between being an armed conflict and falling below the threshold of conflict that triggers application of the law of war.

What is the view of the Afghan government on this question? It is not clear that the government has formally stated its view that this is or is not an armed conflict, but its use of its military to fight the Taliban and detain individuals without charge, as well as its consent to the presence of thousands of foreign troops who continue to engage in combat operations, suggests that the Afghan government would conclude that it is in an armed conflict. It has not, however, invoked a state of emergency under its constitution. If it is a non-international armed conflict, Common Article 3, customary international law applicable in Common Article 3 conflicts and Afghanistan's domestic human rights obligations would govern Afghanistan's treatment of detainees held in the conflict. (This explains why the ISAF/Interim Administration document that Professor Roberts cites refers to the Interim Administration's obligation to conform with "internationally recognized human rights.")

It should also be recognized that Security Council Resolution 1707 provides a legal basis under Chapter VII of the UN Charter for ISAF operations, including detention, regardless of the nature of the fighting in Afghanistan. In some respects, this makes the need to resolve the precise nature of the conflict less important, as ISAF's authorities under the resolution do not depend on the nature of the conflict (or even on the continued existence of a conflict). It also suggests that potentially differing views of the conflict by ISAF members need not prevent effective detention operations on the ground. One could imagine some kind of future arrangement whereby ISAF States were to agree that they would, at a minimum, apply Common Article 3 to detainees; and that States could at their discretion apply higher standards of treatment as a matter of policy; and if the Afghan government agreed that it would apply Common Article 3 and applicable human rights provisions in the International Covenant on Civil and Political Rights<sup>47</sup> and the government of Afghanistan's constitution and laws, then it may not be necessary formally to reconcile the competing descriptions of what is happening on the ground in Afghanistan.

## **B. Different Legal Obligations and Domestic Politics**

Another reason that ISAF States have taken diverse approaches to detention is that they have different legal obligations and face different political pressures. Most notably, European member State contributors to ISAF may be concerned that, in some circumstances, the European Convention on Human Rights<sup>48</sup> extends to

their activities outside their own territories, even during armed conflict. In *Al-Skeini and others v. Secretary of State for Defence*, for instance, the United Kingdom conceded that the ECHR applied to its detention of one individual who died in its custody in Iraq.<sup>49</sup> The UK Court of Appeal upheld a High Court finding that the United Kingdom's Human Rights Act<sup>50</sup> and the ECHR applied to that individual's case because he was within the authority and control of UK forces in Iraq.<sup>51</sup> The House of Lords has just upheld that decision, with the apparent result that any person held by UK forces abroad (and therefore in the United Kingdom's "effective control") would be covered by the Human Rights Act and the ECHR.<sup>52</sup> Similarly, the European Court of Human Rights, in the *Saramati* case, just considered whether troops from France, Germany and Norway, acting as officers of the NATO Peacekeeping Force in Kosovo (KFOR) and UN Mission in Kosovo (UNMIK), violated Articles 1, 5, 6 and 13 of the ECHR in detaining a particular individual.<sup>53</sup> And in the *Behrami* case, the European Court of Human Rights just considered whether France violated an individual's right to life when the individual died from unexploded ordnance in the area of Kosovo in which France was participating in the KFOR mission.<sup>54</sup> The European Court of Human Rights concluded that these cases were inadmissible because each respondent State's acts were "attributable" to the United Nations, pursuant to Chapter VII authority that authorized KFOR and UNMIK, and that the European Court of Human Rights was not in a position to scrutinize these acts. The Court, therefore, was not forced to address how it would have decided the questions if the States had been acting in their sovereign capacities.

Even though France, Germany and Norway won their cases, one imagines that the possibility of such cases, and the lingering ambiguity about whether the Court would have reached a different conclusion if the States were not acting under UN auspices, must create different, and potentially very cautious, political and legal approaches to conflict and peacekeeping for ECHR States parties.

In addition to the ECHR, most NATO member States are parties to Additional Protocols I and II to the Geneva Conventions,<sup>55</sup> whereas the United States is not. In the Afghan conflict, it is not clear whether this fact would have (or has had) any significant impact on the ground. Further, most NATO member States believe that their legal obligations flowing from treaties such as the International Covenant on Civil and Political Rights<sup>56</sup> and the Convention Against Torture<sup>57</sup> apply to their activities extraterritorially. This may account for the fact that the bilateral agreements between NATO States and the Afghan Ministry of Defense regarding individuals detained by ISAF contain provisions that appear to reflect the non-refoulement obligations contained in Article 3 of the CAT. The United States historically has not taken the position that its CAT obligations apply extraterritorially, although as a matter of policy the United States will not transfer

an individual outside of its territory to a country where it is more likely than not that he will be tortured.

Human Rights Watch has described these bilateral arrangements with the government of Afghanistan as follows:

[T]hey share many common features, such as an agreement that NATO forces will release detainees or transfer them to Afghan custody within 96 hours, and that NATO and Afghan authorities will treat detainees in accordance with international law. The agreements further stipulate that Afghan authorities will not try, release, or transfer detainees to a third country without the explicit agreement of NATO forces (presumably to avoid transfer of detainees to . . . jurisdictions where detainees may be subject to mistreatment). Under the agreements seen by Human Rights Watch, NATO forces, as well as the International Committee of the Red Cross, will have access to detainees even after they have been transferred to Afghan custody.<sup>58</sup>

When Canada operated as part of OEF, the Canadian forces turned detainees over to US forces in Afghanistan, but came under public pressure not to do so.<sup>59</sup> Under the original 2005 Canada-Afghanistan Detainee Transfer Arrangement, the Afghanistan Independent Human Rights Commission had guaranteed that it would report any abuses to the Canadian government. As a result of public concern about the mistreatment in Afghan custody of detainees turned over by Canadian forces, the Canadian government recently amended the 2005 Arrangement to bring it into line with pre-existing Denmark-Afghanistan, United Kingdom-Afghanistan and Netherlands-Afghanistan arrangements.<sup>60</sup> The new Arrangement allows Canadians to enter Afghan detention facilities at “any time.”<sup>61</sup>

The United States in its OEF capacity has been cautious about turning over detainees to the government of Afghanistan, due in part to our desire to confirm with greater clarity the legal basis on which the government of Afghanistan would hold them. Contrast the Canadian position: General Gauthier, the lieutenant general who commands the Canadian Expeditionary Forces Command and thus oversees all Canadian forces deployed abroad, was quoted as saying, “Our default setting is transfer. We haven’t held anybody for more than a few hours and we would prefer not to.”<sup>62</sup> As a result of certain allies’ concerns about turning detainees over to the United States or to the Afghans, some allies are choosing not to detain at all, which renders the mission less effective.<sup>63</sup>

Consider the following by David Bosco:

About 7,000 troops from Canada, Britain and the Netherlands are fending off a Taliban resurgence. The demanding mission . . . has also confronted alliance members with the uncomfortable reality that fighting often means taking prisoners. America, of course,

has been taking prisoners in Afghanistan for some time. And that's part of the problem. The European and Canadian publics have been disgusted by reports of prisoner abuse, and they want nothing to do with what they see as American excess . . . So NATO countries have essentially opted out of the detainee business. Before committing their troops to combat areas, the Canadian, Dutch and British governments signed agreements with the Afghan government stating that any captured fighters would be handed over to Afghan authorities rather than to American forces. In practice, these agreements mean that NATO troops have no system in place for regularly interrogating Taliban fighters for intelligence purposes. Whenever possible, they let the Afghan troops they operate with take custody. When that's not possible, they house their prisoners briefly in makeshift facilities while they arrange a transfer to the Afghans. NATO guidelines call for the handover of prisoners within 96 hours, far too brief a time for soldiers to even know whom they're holding. And once prisoners are in Afghan hands, international forces easily lose track of them. It's not good policy. Not only is NATO forfeiting the intelligence benefits that can come with real-time interrogation, it's sending detainees into an Afghan prison system poorly equipped to handle them and rife with abuse.<sup>64</sup>

A Human Rights Watch report confirms the reluctance to detain that Bosco describes. That report, from November 2006, states,

Dutch forces operating in Oruzgan announced their first five detainees two weeks ago, while British and Canadian forces operating in Helmand and Kandahar, respectively, have publicly acknowledged fewer than 100 detainees. Given the ferocity of the fighting in these areas, the absence of more detainees raises two alarming alternatives: either that NATO forces are not taking detainees, or, more likely, that NATO forces are circumventing their bilateral agreements by immediately turning over detainees to Afghan authorities and thus abrogating their responsibility to monitor the detainees' treatment.<sup>65</sup>

Even the political approaches to the fighting in Afghanistan are different. The *New York Times* described the Dutch and US approaches as follows:

[H]ere in Uruzgan Province, where the Taliban operate openly, a Dutch-led task force has mostly shunned combat. Its counterinsurgency tactics emphasize efforts to improve Afghan living conditions and self-governance, rather than hunting the Taliban's fighters. Bloodshed is out. Reconstruction, mentoring and diplomacy are in. American military officials have expressed unease about the Dutch method, warning that if the Taliban are not kept under military pressure in Uruzgan, they will use the province as a haven and project their insurgency into neighboring provinces.<sup>66</sup>

### C. Toward Greater Harmonization

Presumably greater harmony in our approach to the situation in Afghanistan would be useful, as it would permit us more easily to transfer detainees among the various contingents, increase the intelligence we can gather from detainees, approach the Afghan government with a united front, and increase interoperability. Can we achieve greater harmonization? Professor Roberts suggests that the government of Afghanistan establish a country-wide detention regime, although it is not clear if he is suggesting that the regime would or should apply to individuals picked up and held by ISAF forces as well. He also suggests that NATO develop a binding set of rules on all aspects of treatment of security detainees not entitled to prisoner-of-war protections. This seems sensible, although NATO already tried once to achieve such a framework for Afghanistan and was able only to come to agreement on broad parameters.<sup>67</sup> Other ideas might include a new UN Security Council resolution containing language parallel to Resolution 1546, and a more detailed framework modeled on CPA Memorandum No. 3 (such that standards of any internment facility shall be in accordance with the Fourth Geneva Convention, Part III, Section IV). Finally, ISAF States could agree as a policy matter to treat all detainees in their custody as prisoners of war. One might also explore practical changes as well, such as a “left-seat, right-seat” approach to Afghan detention facilities, whereby the government of Afghanistan runs the detention facility with assistance and oversight by NATO forces from different countries. Any such solutions would require certain legal and political concessions from both the US government and other NATO contributors.

### V. Conclusion

I would like to circle back to Professor Roberts’s ongoing discomfort with the US efforts dealing with the “war on terror” since September 11. Professor Roberts, like many other critics of US policy over the last six years, is concerned about the phrase “war on terror.” But the phrase “global war on terror” is a political statement, not a legal assertion.<sup>68</sup> The United States uses this term to mean that all nations must strongly oppose terrorism in all of its forms, around the world. We do not think we are in an armed conflict with all terrorists everywhere. We do, however, believe that we are in a legal state of armed conflict with al Qaeda, which includes an armed conflict in Afghanistan. That said, the questions raised by this armed conflict are difficult, and the laws in place on September 11—internationally and domestically—were not crafted to deal with the factual scenario we suddenly faced. In working through these difficult problems, the balance of powers in the US system has worked—not failed—for many of the critical elements of the three

conflicts discussed. I would challenge this audience and our friends and critics to look objectively at where the law now stands, and determine on that basis whether a detention framework now exists that strikes an appropriate and durable balance between humanitarian concerns and military requirements in this and future non-traditional conflicts. I would also suggest that detention in Afghanistan presents hard questions not just for the United States but for all States contributing to ISAF, and that we should continue to put our heads together on these difficult and pressing questions.

### **Notes**

1. Adam Roberts, *Torture, Detainees, and Incompetence in the “War on Terror,”* 49 SURVIVAL, Spring 2007, at 199, available at [http://ccw.politics.ox.ac.uk/publications/roberts\\_survival49-1\\_reviewarticle1\\_torture.pdf](http://ccw.politics.ox.ac.uk/publications/roberts_survival49-1_reviewarticle1_torture.pdf).
2. Available at [http://www.opiniojuris.org/posts/chain\\_1169503291.shtml](http://www.opiniojuris.org/posts/chain_1169503291.shtml).
3. *Id.*
4. S.C. Res. 1707, U.N. Doc. S/RES/1707 (Sept. 12, 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/517/70/PDF/N0651770.pdf?OpenElement>.
5. Adam Roberts, Counterterrorism and the Laws of War: A Critique of the U.S. Approach, Address at the Brookings Institution (Mar. 11, 2002), available at <http://www.brookings.edu/events/2002/0311terrorism.aspx>.
6. US Department of Defense, Directive 2311.01E, DoD Law of War Program (May 9, 2006), available at [http://www.fas.org/irp/doddir/dod/d2311\\_01e.pdf](http://www.fas.org/irp/doddir/dod/d2311_01e.pdf).
7. See Declaration of Colonel James W. Gray, submitted in the case of Fadi Al Maqaleh v. Gates, US District Court for the District of Columbia, Civil Action No. 06-CV-01669 (JDB).
8. Detainee Treatment Act of 2005, Pub. L. No. 109-148, sec. 1003(a), 119 Stat. 2680, 2739 (codified as amended at 42 U.S.C.A. sec. 2000dd (West 2001 & Supp. 2006)), available at <http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php>.
9. Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Feb. 4, 1985, G.A. Res. 46, U.N. GAOR 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/RES/39/708 (1984), reprinted in 23 INTERNATIONAL LEGAL MATERIALS 1027 (1984), available at <http://www.hrweb.org/legal/cat.html>.
10. US Department of Defense, Directive 2310.01E, The Department of Defense Detainee Program (Sept. 5, 2006), available at [http://www.fas.org/irp/doddir/dod/d2310\\_01e.pdf](http://www.fas.org/irp/doddir/dod/d2310_01e.pdf).
11. Headquarters, Department of the Army, FM 2-22.3, Human Intelligence Collector Operations (Sept. 2006), available at [http://www.fcnl.org/pdfs/civ\\_liberties/Field\\_Manual\\_Sept06.pdf](http://www.fcnl.org/pdfs/civ_liberties/Field_Manual_Sept06.pdf).
12. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement>.
13. *Id.*
14. *Id.*
15. S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006) and annexed letter dated Nov. 17, 2006 from the US Secretary of State to the President of the Security Council, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/632/35/PDF/N0663235.pdf?OpenElement>.

16. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 301 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

17. L. Paul Bremer, Coalition Provisional Authority Memorandum No. 3 (Revised) (June 27, 2004), *available at* [http://www.cpa-iraq.org/regulations/20040627\\_CPAMEMO\\_3\\_Criminal\\_Procedures\\_Rev\\_.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev_.pdf) [hereinafter CPA Memorandum No. 3].

18. The United Kingdom similarly uses a CRRB comprised of UK and Iraqi members. See <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/209/7011108.htm>. CRRBs review detainee files approximately every six months.

19. CPA Memorandum No. 3, *supra* note 17, sec. 6(4).

20. *Id.*, sec. 6(5) and (6).

21. *Id.*, sec. 6(8).

22. See Roberts, *supra* note 1, at 201.

23. MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 44 (2004).

24. Campbell Brown, *New Front in Iraq Detainee Abuse Scandal?*, MSN.COM (May 20, 2004), *available at* <http://www.msnbc.msn.com/id/5024068/>.

25. Karen J. Greenberg & Joshua L. Dratel, *A Legal Narrative: The Torture Memos*, COUNTERPUNCH, Feb. 1, 2005, *available at* <http://www.counterpunch.org/dratel02012005.html>.

26. *Supra* note 8.

27. War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C.A. sec. 2441 (West 2000 & Supp. 2007)).

28. 126 S.Ct. 2749 (2006). The Court did not even treat the issue as in doubt; the majority, concurring and dissenting opinions in *Hamdan* all assumed the existence of an armed conflict with al Qaeda, though the various justices did not all agree on the nature of the conflict (non-international or international).

29. US Army Field Manual 2-22.3, Human Intelligence Collector Operations, (Sept. 2006), *available at* <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>.

30. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *available at* [http://www.washingtonpost.com/wp-srv/politics/documents/cheney/military\\_commissions\\_act.pdf](http://www.washingtonpost.com/wp-srv/politics/documents/cheney/military_commissions_act.pdf).

31. Parhat v. Gates, No. 06-1397 (D.C. Cir.); Bismullah v. Gates, No. 06-1197 (D.C. Cir.). Transcript of oral argument (May 2007) available at <http://www.scotusblog.com/movabletype/archives/May%202015%202007%20CA%20detainee%20hearing.pdf>.

32. Roberts, *supra* note 5.

33. See Colm Campbell, “*Wars on Terror*” and *Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict*, 54 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 321, 326 (2005). (“There were echoes of this approach in the early stages of the Northern Ireland conflict. For the British Home Secretary in 1971, the Government was ‘at war with the IRA’, a categorization also employed by the Northern Ireland Prime Minister (‘we are, quite simply, at war with the Terrorist . . .’). This language was quickly dropped. For the most part, the UK was careful to create a narrative of its behaviour in terms of a response to terrorist criminality, even if from time-to-time, the rhetoric of ‘war’ was drawn upon to justify particularly harsh measures.”)

34. Authorization to Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), *available at* <http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html>.

35. See *Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld: Hearing Before the S. Comm. on Armed Services*, 109th Cong. (July 19, 2006) (statement of Neal

Katyal), available at <http://www.law.georgetown.edu/faculty/nkk/documents/Katyal.testimony.SASC.v18.pdf>.

36. To receive testimony on legal issues regarding individuals detained by the Department of Defense as unlawful enemy combatants: Hearing Before the S. Comm. on Armed Services, 110th Cong. (Apr. 26, 2007) (testimony of Neal Katyal), available at <http://www.senate.gov/~clinton/news/statements/details.cfm?id=273211>.

37. Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2799 (2006) (Breyer, J., concurring).

38. Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part and concurring in the judgment).

39. Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007).

40. *Id.* at 166.

41. *Id.* at 195.

42. Some who believe that the international armed conflict in Afghanistan ended in June 2002 when President Karzai took power submit that the United States was obligated to release at that time those individuals it detained in that conflict. Amnesty International has taken this position. See Written Evidence submitted by Amnesty International UK to the House of Commons, Select Committee on Foreign Affairs (Nov. 7, 2006), available at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/44we03.htm>. Amnesty International does acknowledge the ability to detain in non-international armed conflict. In a case in which an international armed conflict has become a non-international armed conflict, albeit with the same basic parties to the conflict, it seems very formalistic to insist that the United States release Taliban detainees from an international armed conflict, only to turn around and pick up those same detainees in the non-international armed conflict.

43. Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon*, 33 AMERICAN UNIVERSITY LAW REVIEW 145 (1983).

44. See International Committee of the Red Cross, International humanitarian law and terrorism: questions and answers (May 5, 2004), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5YNLEV> (asserting that the Afghanistan conflict became a non-international armed conflict in June 2002).

45. See THE SENLIS COUNCIL, CANADA IN KANDAHAR: NO PEACE TO KEEP: A CASE STUDY OF THE MILITARY COALITIONS IN SOUTHERN AFGHANISTAN 21–22 (2006), available at [http://www.senlisouncil.net/documents/Kandahar\\_Report\\_June\\_2006](http://www.senlisouncil.net/documents/Kandahar_Report_June_2006).

46. See, for example, <http://www.auswaertiges-amt.de/diplo/en/Startseite.html> (Germany's Federal Foreign Office website) (making no reference to armed conflict); [http://www.germany.info/relaunch/politics/new/pol\\_bwehr\\_isaf\\_06\\_2006.html](http://www.germany.info/relaunch/politics/new/pol_bwehr_isaf_06_2006.html) (same, and stating that fighting the Taliban and al Qaeda is primarily the mission of OEF forces, not ISAF).

47. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>.

48. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://www.hri.org/docs/ECHR50.html>.

49. The Queen (on the application of Al-Skeini and Others) v. Secretary of State for Defence [2006] 3 W.L.R. 508, para. 6 [hereinafter Al-Skeini (CA)].

50. Human Rights Act, 1998, c. 42, available at [http://www.opsi.gov.uk/acts/acts1998/ukpga\\_19980042\\_en\\_1](http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1).

51. Al-Skeini (CA), *supra* note 49.

52. Al-Skeini and others v. Secretary of State for Defence [2007] UKHL 26, available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.htm>.

53. Saramati v. France, Germany and Norway, App. No. 78166/01, ECHR—Grand Chamber (May 31, 2007), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=saramati&sessionid=6090347&skin=hudoc-pr-en>.

54. Behrami v. France, App. No. 71412/01, ECHR—Grand Chamber (May 31, 2007), *available at id.*

55. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 16, at 422 and 483, respectively.

56. *Supra* note 47.

57. *Supra* note 9.

58. Letter from Brad Adams, Executive Director, Asia Division, Human Rights Watch, to NATO Secretary General (Nov. 28, 2006), *available at* [http://hrw.org/english/docs/2006/11/28/afghan14684\\_txt.htm](http://hrw.org/english/docs/2006/11/28/afghan14684_txt.htm) [hereinafter Letter to NATO].

59. CBC News, *The controversy over detainees*, CBC.CA, Apr. 27, 2007, <http://www.cbc.ca/news/background/afghanistan/detainees.html>.

60. Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, Can.-Afg., Dec. 18, 2005, *available at* [http://www.forces.gc.ca/site/operations/archer/Afghanistan\\_Detainee\\_Arrangement\\_e.pdf](http://www.forces.gc.ca/site/operations/archer/Afghanistan_Detainee_Arrangement_e.pdf). For a description of the Dutch and UK agreements, see Michael Byers & William A. Schabas, Canadian War Criminals? Experts want top officials investigated, THE TYEE, Apr. 27, 2007, <http://thetyee.ca/Views/2007/04/27/WarCrime/>.

61. CBC News, *World court asked to look into Afghan detainee controversy*, CBC.CA, Apr. 26, 2007, <http://www.cbc.ca/canada/story/2007/04/26/afghan-detainees.html>. The article cited in endnote 60 states that the Dutch-Afghan agreement guaranteed Dutch military forces, embassy officials and the ICRC access to detainees. That arrangement also required written notification of a prisoner's transfer to a third party or any other significant changes.

62. Paul Koring, *Troops Told Geneva Rules Don't Apply to Taliban*, GLOBE AND MAIL (Canada), May 31, 2006, at A1, *available at* <http://listserv.acsu.buffalo.edu/cgi-bin/wa?A2=ind0605&L=justwatch-l&O=D&P=89330>.

63. David Bosco, *A Duty NATO Is Dodging in Afghanistan*, WASHINGTON POST (Nov. 5, 2006), at B07, *available at* <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=18842&prog=zgp&proj=zme>.

64. *Id.*

65. Letter to NATO, *supra* note 58. Human Rights Watch seems to be speculating that the relevant countries are turning over detainees to the government of Afghanistan on the battlefield, rather than processing them through the countries' internal systems before turning them over to the government of Afghanistan pursuant to the formal arrangements. See also Second Memorandum from the Ministry of Defence, The attitude of the people towards the International military presence inside Afghanistan para. 7 (Feb. 14, 2006), Written Evidence submitted to the House of Commons, Select Committee on Defence, *available at* <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmdefence/558/558we04.htm> [hereinafter Second Memorandum] ("Since 2001 we have detained in Afghanistan on very few occasions, and all individuals were subsequently released. The UK has not transferred any detainee to the Afghan authorities or into the custody of US forces, and there are currently no individuals being detained under UK authority in Afghanistan. Current UK policy is not to detain individuals

unless absolutely necessary; and indeed it has rarely been necessary to do so in ISAF's current area of operation").

66. C.J. Chivers, *Dutch Soldiers Stress Restraint in Afghanistan*, NEW YORK TIMES, Apr. 6, 2007, at A1, available at [http://www.nytimes.com/2007/04/06/world/asia/06afghan.html?\\_r=1&scp=1&sq=&st=nyt&oref=slogin](http://www.nytimes.com/2007/04/06/world/asia/06afghan.html?_r=1&scp=1&sq=&st=nyt&oref=slogin).

67. Second Memorandum, *supra* note 65, paras. 4–6 (“ISAF policy, agreed by NATO, is that individuals should be transferred to the Afghan authorities at the first opportunity and within 96 hours, or released . . . . NATO Rules of Engagement set out the circumstances in which individuals may be detained by ISAF troops, but do not cover their subsequent handling . . . . Work continues within NATO on clarification of detention issues, in discussion with the Afghan government, as NATO prepares for expansion beyond the North and West of Afghanistan. Handling of detainees after detention is a matter for individual states to negotiate with the Afghan Government as appropriate.”).

68. See John Bellinger, Legal Issues in the War on Terrorism, Address at the London School of Economics (Oct. 31, 2006), available at <http://www.state.gov/s/l/rls/76039.htm>.

# IX

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## Distinction and Loss of Civilian Protection in International Armed Conflicts

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Yoram Dinstein\*

### *A. The Principle of Distinction*

There are several cardinal principles lying at the root of the law of international armed conflict. Upon examination, none is more critical than the “principle of distinction.”<sup>1</sup> Undeniably, this overarching precept constitutes an integral part of modern customary international law.<sup>2</sup> It is also reflected in Article 48 of the 1977 Protocol I Additional to the Geneva Conventions of 1949, entitled “Basic rule,” which provides that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>3</sup>

As is clear from the text, the pivotal bifurcation is between civilians and combatants (and, as a corollary, between military objectives and civilian objects). It is wrong to present the dichotomy, as the International Committee of the Red Cross (ICRC) sometimes does,<sup>4</sup> in the form of civilians versus members of the armed forces.<sup>5</sup> Apart from the fact that not every member of the armed forces is a combatant (medical and religious personnel are excluded),<sup>6</sup> civilians who directly participate in hostilities lose their civilian status for such time as they are acting in this fashion although they are not members of any armed forces (see *infra* Section B).

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It is almost axiomatic that, as a rule, all enemy combatants can be lawfully attacked directly—at all times—during an international armed conflict. This can be done whether they are advancing, retreating or remaining stationary, and, as discussed later in this article, whether they are targeted in groups or individually.<sup>7</sup> There are, however, a number of caveats: (i) the attack must be carried out outside neutral territory, (ii) it is not allowed when a ceasefire is in effect, (iii) no prohibited weapons may be used, (iv) no perfidious methods of warfare may be resorted to, (v) combatants are not to be attacked once they become *hors de combat* (by choice (surrendered personnel) or because they are wounded, sick or shipwrecked),<sup>8</sup> and (vi) the attack must not be expected to cause excessive injury to civilians.

The hallmark of civilian status in wartime is that, in contrast to combatants, civilians—as well as civilian objects—enjoy protection from attack by the enemy. Intentionally directing attacks against civilians (not taking direct part in hostilities) or civilian objects is a war crime under Article 8(2)(b)(i)–(ii) of the 1998 Rome Statute of the International Criminal Court.<sup>9</sup>

The term “attack” in this context means any act of violence,<sup>10</sup> understood in the widest possible sense (including a non-kinetic attack), as long as it entails loss of life, physical or psychological injury, or damage to property. Attacks do not include non-forcible acts, such as non-injurious psychological warfare. The line of division between what is permissible and what is not is accentuated by computer network attacks (CNA). These would qualify as attacks within the accepted definition only if they engender—through reverberating effects—human casualties or damage to property (it being understood that a completely disabled computer is also damaged property).<sup>11</sup>

It is illegal to launch an attack the primary purpose of which is to spread terror among the civilian population.<sup>12</sup> The prohibition is applicable even if the attacker has every reason to believe that such a terror campaign will shatter the morale of the civilian population—so that the enemy’s determination to pursue the armed conflict will be eroded—and the war will be brought to a rapid conclusion (saving, as a result, countless lives on both sides).<sup>13</sup> Yet, an important rider is in order. What counts here is not the actual effect of the attack but its purpose or intent: an attack is not forbidden unless terrorizing civilians is its primary aim.<sup>14</sup> Nothing precludes mounting an otherwise lawful attack against combatants and military objectives, even if the net outcome (due to resonating “shock and awe”) is the collapse of civilian morale and the laying down of arms by the enemy.

The principle of distinction excludes not only deliberate attacks against civilians, but also indiscriminate attacks, i.e., instances in which the attacker does not target any specific military objective (due either to indifference as to whether the ensuing casualties will be civilians or combatants or, alternatively, to inability to

control the effects of the attack).<sup>15</sup> A leading example is the launching by Iraq of Scud missiles against military objectives located in or near residential areas in Israel in 1991, notwithstanding the built-in imprecision of the Scuds which made accuracy in acquiring military objectives virtually impossible (and, in the event, no military objective was struck).

In regular inter-State warfare—where asymmetrical warfare is not part of the military equation—the prohibition of indiscriminate attacks is perhaps of even greater practical import than that of the ban of direct attacks against civilians. The reason is that, generally speaking, the armed forces of a civilized country are rarely likely nowadays to target civilians with premeditation. However, the prospect of the incidence of indiscriminate attacks—predicated, as it is, on lack of concern rather than on calculation—is much higher. A commonplace illustration would be a high-altitude air raid, carried out notwithstanding conditions of zero visibility and malfunctioning instruments for identifying preselected military objectives. Certainly, military training must tenaciously address the issue of indiscriminate attacks if they are to be eliminated.

The flip side of civilian objects (which are protected from attack) is military objectives (which are not). The authoritative definition of military objectives appears in Article 52(2) of Additional Protocol I:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>16</sup>

This definition is very open ended, if only because every civilian object—not excluding even a hospital or a church—is susceptible to use by the enemy for military purposes. Such use (or abuse) will turn even a hospital or a place of worship into a military objective, exposing it to a lawful attack under certain conditions. The only attenuating consideration is that, under Article 52(3) of Protocol I, in case of doubt the presumption should be that such a place is actually used for the normal purposes to which it is dedicated.<sup>17</sup>

It follows that the key to robust civilian protection lies, perhaps, less in the fundamental requirement of concentrating attacks on identifiable military objectives and more in the complementary legal condition of observing proportionality in the effects of the attack. This means, as prescribed in Article 51(5)(b) of Protocol I, that—when an attack against a military objective is planned—incidental losses to civilians or civilian objects (usually called “collateral damage”) must not be

expected to be “excessive in relation to the concrete and direct military advantage anticipated.”<sup>18</sup> Intentionally launching an attack in the knowledge that it will cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated is a war crime under Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court.<sup>19</sup>

The expectation of excessive incidental losses to civilians or damage to civilian objects taints an attack as indiscriminate in character. Yet it must be borne in mind that not every inconvenience to civilians ought to be considered relevant. In wartime, there are inevitable scarcities of foodstuffs and services. Indeed, food, clothing, petrol and other essentials may actually be rationed; buses and trains may not run on time; curfews and blackouts may impinge on the quality of life; etc. These do not count in the calculus of proportionality. Moreover, the military advantage anticipated from an attack must be viewed in a rather holistic fashion: when a large-scale attack is in progress, it is not required to assess every discrete segment in isolation from the overall picture.<sup>20</sup>

Undeniably, what is deemed excessive is often a matter of subjective appraisal, which takes place in the mind of the beholder (always remembering that the appraisal must be done in a reasonable fashion). The difficulty is that military advantage and civilian casualties are like the metaphorical apples and oranges: a comparison between them is an art, not a science. Civilian losses can be counted, civilian damage can be surveyed and estimated, but how can you quantify a military advantage on a measurable scale? Additionally, since the entire process is a matter of pre-attack evaluation and expectation, it must be acknowledged that it is embedded in probabilities. What is to be done if “the probability of gaining the military advantage and of affecting the civilian population is not 100 percent but lower and different”?<sup>21</sup>

All the circumstances must be factored in. Thus, the bombardment of a hospital or a church used by the enemy may be given a green light if the actual number of patients or worshippers on site is negligible, whereas, should the numbers be disproportionate, the attack may have to be aborted. However, there is a difference between the cases of, say, one mosque where the minaret is used by a single enemy sniper and another serving as a command and control center of an armored division. Taking out the sniper must not entail a substantial civilian price tag, but the elimination of a key command and control center is a different matter. It has to be borne in mind that “excessive” is not interchangeable with “extensive.” Some scholars take that position,<sup>22</sup> but it is based on a misreading of the text.<sup>23</sup> If the strategic and military value of a military objective is exceedingly high, significant collateral civilian losses resulting from an attack may well be countenanced.

Any planned attack—and any commensurate estimate of the number of civilians present in or near military objectives—must be based on up-to-date intelligence. The “fog of war” is such that mistakes are unavoidable in every sizable military operation. When a legal analysis is made after the event, there is a built-in temptation to scrutinize the situation with the benefit of hindsight. But this temptation must be strongly resisted. The proper question is not whether collateral damage to civilians proved to be excessive in actuality: it is whether collateral damage could or should have been reasonably expected to be excessive at the time of planning, ordering or carrying out the attack. A reasonable expectation has to be linked to the data collated and interpreted at the time of action. Evidently, a valid evaluation of the state of affairs must be based on information that is current and not obsolete. If crucial information (say, about the absence of civilians from the vicinity of a military objective) is derived from a reconnaissance mission, the attack should follow soon thereafter since a long interval may mean that the facts on the ground have undergone a profound change.<sup>24</sup>

Pursuant to Article 57(2)(a)(ii) of Additional Protocol I, those who plan or decide on an attack must take all feasible precautions (taking into account all circumstances prevailing at the time), if not to avoid altogether, at least to minimize incidental losses to civilians or civilian objects.<sup>25</sup> Yet the aspiration to minimize collateral damage cannot trump all other military inputs. Minimize the costs to civilians, yes, but not at all costs to the attacking force. There is no obligation incumbent on the attacker to sustain military losses only in order to minimize incidental losses to enemy civilians or civilian objects. “Survival of the military personnel and equipment is an appropriate consideration when assessing the military advantage of an attack in the proportionality context.”<sup>26</sup>

Minimizing incidental losses or injury to civilians can be accomplished through the employment of precision-guided munitions (PGM)—where available—to target a military objective located in the midst of a densely populated residential area. The use of PGM enables the strike to be surgical, with little collateral damage expected to the surrounding civilians or civilian objects. As pointed out by Michael Schmitt, this is so not only because PGM are more accurate, but also because “the explosive charge needed to achieve the desired result is typically smaller than in their unguided counterparts.”<sup>27</sup>

In order to achieve the same goal of sparing civilians and civilian objects from the effects of attacks, Article 57(3) of Protocol I sets forth that, if a choice is possible among several military objectives for obtaining a similar military advantage, the one expected to cause the least incidental civilian losses and damage should be selected.<sup>28</sup> But, again, the unfortunate truth is that it is often impossible to determine

with any degree of credibility whether the elimination of diverse military objectives would afford a similar military advantage.

Other feasible precautions include—if circumstances permit—the issuance of effective advance warnings to civilians of an impending attack (in conformity with Article 57(2)(c) of Additional Protocol I<sup>29</sup>). All the same, circumstances do not always permit the issuance of such warnings. Otherwise, surprise attacks would have had to be struck out of the military vocabulary.

“The law of armed conflict singles out for special protection certain specified categories of civilians, either because they are regarded as especially vulnerable or on account of the functions they perform.”<sup>30</sup> The first category is illustrated by women and children,<sup>31</sup> and the second by civilian medical and religious personnel.<sup>32</sup> In the same vein, certain civilian objects—for instance, cultural property<sup>33</sup> or places of worship<sup>34</sup>—also enjoy special protection. But the special protection must be looked upon as merely the icing on the cake: it adds some flavor but it does not really affect the core. Some additional elements—enhancing the range of the protection—are brought into play, for the benefit of the selected persons or objects, yet the most vital safeguards are granted to all civilians and civilian objects without fail. There is also a proviso: protection (even special protection) may be lost as a result of a failure to meet prescribed conditions, as stipulated by the law of international armed conflict.

### ***B. Direct Participation in Hostilities***

Direct participation of a civilian in hostilities leads to loss of protection from attack of the person concerned (within the temporal limits of the activity in question). As promulgated in Article 51(3) of Protocol I, civilians enjoy a general protection against dangers arising from military operations “unless and for such time as they take a direct part in hostilities.”<sup>35</sup> Occasionally, the reference is to “active” (instead of “direct”) participation in hostilities,<sup>36</sup> and at times either adjective is deleted.<sup>37</sup> The bottom line is essentially the same:<sup>38</sup> a person who takes part in hostilities loses his protection. There is no doubt that, as held by the Supreme Court of Israel (per President Barak) in the *Targeted Killings* case of 2006, this norm reflects customary international law.<sup>39</sup>

There is a consensus that a civilian can be targeted at such time as he is taking a direct part in hostilities.<sup>40</sup> There is nevertheless a serious debate about taxonomy. For my part, I believe that by directly participating in hostilities a person turns into a combatant—indeed, more often than not, an unlawful combatant.<sup>41</sup> On the other hand, the ICRC, while conceding that “[l]oss of protection against attack is

clear and uncontested,”<sup>42</sup> adheres to the view that the status of that person remains one of a civilian.

The difference of opinion about status has a practical consequence only when the person concerned is captured. I am inclined to think that, as an unlawful combatant, the person loses the general protection of the Geneva Conventions (except in occupied territories) and only enjoys some minimal safeguards, in conformity with human rights standards. The ICRC maintains that the general protection of civilian detainees under Geneva Convention (IV) applies also to civilians directly participating in hostilities. My own position is predicated on Article 5 of that Convention, whereby—other than in occupied territories—those engaged in hostilities do not benefit from the privileges of the Convention, although they still have to be treated with humanity and are entitled to a fair trial.<sup>43</sup>

The words “for such time” appearing in Article 51(3) of Protocol I raise serious questions about their scope.<sup>44</sup> The government of Israel has traditionally contended that these words do not reflect customary international law, but the Supreme Court has utterly rejected that submission.<sup>45</sup> The Court made it clear that a civilian who only sporadically takes a direct part in hostilities does not lose protection from attack on a permanent basis: once he disconnects himself from these activities, he regains his civilian protection from attack<sup>46</sup> (although he may still be detained and prosecuted for any crime that he may have committed during his direct participation in hostilities<sup>47</sup>).

The desire to confine the exposure of the civilian who directly participates in hostilities to a finite space of time makes a lot of sense. It is worthwhile to remember that many armed forces in the world incorporate large components of reservists who are called up for a prescribed period and are then released from service. A reservist is basically a civilian who wears the uniform of a combatant for a while and is then cloaked again with the mantle of a civilian. Surely, for such time as he is a combatant, a reservist can be attacked. Yet, before and after, *qua* civilian, he is exempt from attack. The same consideration should apply *grosso modo* to other types of civilians turned combatants and vice versa.

There are two salient riders added to the general proposition by the judgment in the *Targeted Killings* case. The first is that the cycle of direct participation in hostilities commences at an early stage of preparation and deployment, continuing throughout the engagement itself, to cover also the disengagement and return phase.<sup>48</sup> Although there are those who maintain that the expression “for such time” should be construed strictly as encompassing only the engagement itself, this claim is generally rejected.<sup>49</sup> I (and others) take the position that, in demarcating the relevant time span in the course of which the person concerned is actually taking part

in hostilities, it is permissible to go as far as reasonably possible both “upstream” and “downstream” from the actual engagement.

The second rider is that while a person directly participating in hostilities more than once may still revert to a civilian status during an interval, this cannot be brought off when the hostile activities take place on a steadily recurrent basis with brief pauses (the so-called “revolving door” phenomenon).<sup>50</sup> Those attempting to be “farmers by day and fighters by night” lose protection from attack even in the intermediate periods punctuating military operations. The same rationale applies if an individual becomes a member of an organized armed group (which collectively takes a direct part in the hostilities): he would lose civilian protection for as long as that membership lasts. In the locution of the Court, an organized armed group becomes the “home” of the terrorist for whom a respite—interposing between acts of hostilities—merely means preparation for the next round.<sup>51</sup> In practical terms, the individual in question may be targeted (see *infra* Section C), even when not personally linked to any specific hostile act—simply due to his membership in such a group—as long as that membership continues.

There is no doubt that the construct of direct participation in hostilities is not open ended, and it “is far narrower than that of making a contribution to the war effort.”<sup>52</sup> Still, a whole range of activities can be identified as concrete examples of direct participation in hostilities. As the Supreme Court of Israel expounded, these include not only using firearms or gathering intelligence, but also acting as a guide to combatants, and, most pointedly, masterminding such activities through recruitment or planning (in contradistinction to, e.g., merely donating money contributions or selling supplies to combatants: the latter activities do not come within the ambit of direct participation in hostilities).<sup>53</sup>

Under Article 50(1) of Protocol I, “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”<sup>54</sup> The provision is particularly germane to the issue of direct participation in hostilities. It is imperative to ensure that military units tasked with the mission of winnowing out civilians who engage in hostilities will not treat all civilians as targetable, “shooting first and asking questions later.”<sup>55</sup> Additionally, the presence of civilians directly participating in hostilities among the civilian population does not deprive the population at large of the protection from attack that it is entitled to.<sup>56</sup>

The theme of direct participation in hostilities has been under study for a number of years by a group of experts under the aegis of the ICRC. While the study has not yet been consummated, it has exposed a number of challenging questions and has led to lengthy debates. One hotly contested point will be discussed *infra* in detail. But there is a host of thorny problems. By way of illustration, there are disputes regarding the different degrees of civilian contribution to electronic warfare,

ranging from the mere maintenance of military computers to playing the role of the “man in the loop” guiding—perhaps from a great distance—a military unmanned aerial vehicle (UAV) or a CNA, with a view to causing death, destruction or damage. There are also arguments concerning the roles of civilian contractors who may offer purely logistical services (e.g., refueling military aircraft en route to a far-away armed conflict) but may also be carrying out paramilitary missions (such as guarding supply convoys) near the contact zone with the enemy.

### ***C. Targeted Killings of Civilians Directly Participating in Hostilities***

Hague Regulation 23(b) forbids the treacherous killing of enemy individuals,<sup>57</sup> and Article 37(1) of Additional Protocol I prohibits killing an adversary by resort to perfidy (defined as an act inviting the confidence of an adversary to lead him to believe that he is entitled to—or is obliged to accord—protection under the law of international armed conflict, with an intent to betray that confidence).<sup>58</sup> However, when perfidy is not in play, even the ICRC *Model Manual* concedes that an enemy individual combatant may be targeted (including a head of state who is the commander-in-chief).<sup>59</sup>

There is a nexus between the question of whether a civilian is directly participating in hostilities and the issue of targeted killing. Logic dictates that, since a combatant may be individually targeted for attack, the same rule should apply to a civilian who takes a direct part in hostilities (at such time as he is indulging in that activity). But scholars like to debate the deceptively simple hypothetical scenario of a civilian driving an ammunition truck to supply the armed forces. One view (maintained by General A.P.V. Rogers) is that this will not result in the forfeiture of civilian protection, although the presence of the civilian driver in the ammunition truck—a palpable military objective—will put him at risk should the truck be attacked on his watch.<sup>60</sup> To fully perceive what is at issue, it is necessary to flesh out the postulated sequence of events. Let us assume that the ammunition truck reaches a gas station and the driver parks the truck, going into a mini-mart to purchase some refreshments. An enemy commando unit, lying in wait, is mounting an attack during that exact time frame. The question is: can the commandos attack only the ammunition truck (at its parking spot, which may be heavily guarded) or can they also kill or neutralize the driver when he is by himself inside the mini-mart? General Rogers’s position is clear cut: only the ammunition truck can be attacked. As soon as the driver detaches himself from the truck, he sheds the risk and benefits from civilian protection. I (among others) disagree. We believe that it all depends on whether the script unfolds in geographic proximity to the front line or far away from it. If the location is at a great distance from the front line (say, in the

continental United States while the front line is in Afghanistan), the driver remains a civilian and runs a risk solely when he is in or near the ammunition truck. However, if the venue shifts and the ammunition truck is being driven in immediate logistical support of the military units deployed at the front line, the driver must be considered a civilian directly participating in hostilities: he then loses protection from attack even when he steps out of the truck.<sup>61</sup> In the *Targeted Killings* case, the Supreme Court of Israel has clearly endorsed the latter view.<sup>62</sup>

In occupied territories, there is a preliminary issue related to targeted killings of civilians directly participating in hostilities, namely, whether the occupying power is capable of taking effective law enforcement measures vis-à-vis such persons in lieu of slaying them. As President Barak stressed, detention of a person directly participating in hostilities against the occupying power is the preferred step, provided that his arrest is feasible.<sup>63</sup> If detention is not a viable option, it must be recognized that a civilian taking a direct part in hostilities risks his life—like any combatant—and is exposed to a lethal attack.<sup>64</sup> Differently put, a strike targeting such a person—and killing him—is permissible when non-lethal measures are either unavailable or ineffective.<sup>65</sup>

Although the Supreme Court of Israel pronounced that a targeted killing of a terrorist in an occupied territory (when detention is not feasible) is lawful, the Court was adamant that whenever innocent civilians are present in the vicinity of the targeted individual and they are likely to be injured, the principle of proportionality must be applied.<sup>66</sup> The relevance of the principle of proportionality in the setting of targeted killings has come to the fore in Israel, because of a highly publicized use of a one-ton bomb against a well-known Palestinian terrorist hiding in a residential area. There is a growing public sentiment that such a massive bomb should not have been used, since it was almost bound to cause excessive collateral damage to civilian bystanders.

#### **D. Human Shields**

This raises the cognate issue of the use of civilian “human shields” intended to lend protection to combatants or military objectives. Article 28 of Geneva Convention (IV) states that “[t]he presence of a protected person may not be used to render certain points or areas immune from military operations.”<sup>67</sup> For its part, Article 51(7) of Protocol I reads, in part, that “[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.”<sup>68</sup> Irrefutably, the prohibition of the use of civilians as human shields mirrors customary

international law.<sup>69</sup> Utilizing the presence of civilians or other protected persons to render certain points, areas or military forces immune from military operations is recognized as a war crime by Article 8(2)(b)(xxiii) of the Rome Statute.<sup>70</sup>

It is incontrovertible that when combatants (including civilians directly participating in hostilities) surround themselves by civilians, this is a breach of the law of international armed conflict. All the same, it is necessary to distinguish between voluntary and involuntary human shields. As the Supreme Court of Israel (per President Barak) held in the *Targeted Killings* case, whereas involuntary human shields are victims, voluntary human shields are to be deemed civilians who take a direct part in hostilities.<sup>71</sup> That being the case, voluntary human shields are targetable and, of course, they “are excluded in the estimation of incidental injury when assessing proportionality.”<sup>72</sup>

What if, contrary to the law of international armed conflict, involuntary human shields are actually compelled to screen a military objective? Article 51(8) of Protocol I sets forth that a violation of the prohibition of shielding military objectives with civilians does not release a belligerent party from its legal obligations vis-à-vis the civilians.<sup>73</sup> What this means is that the principle of proportionality in attack remains in effect. I do not deny that the principle of proportionality must still govern the planning of an attack against a military objective screened by involuntary civilian human shields. However, in my opinion, the test of excessive injury to civilians must be relaxed in such exceptional circumstances. That is to say, to my mind, the appraisal of whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that, by dint of the large (albeit involuntary) presence of civilians at the site of the military objective, the number of civilian casualties can be expected to be higher than usual. To quote Louise Doswald-Beck, “[t]he Israeli bombardment of Beirut in June and July of 1982 resulted in high civilian casualties, but not necessarily excessively so given the fact that the military targets were placed amongst the civilian population.”<sup>74</sup> This approach is confirmed by the 2004 UK *Manual on the Law of Armed Conflict*:

Any violation by the enemy of this rule [the prohibition of human shields] would not relieve the attacker of his responsibility to take precautions to protect the civilians affected, but the enemy’s unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected.<sup>75</sup>

Customary international law is certainly more rigorous than Protocol I on this point. It has traditionally been grasped that, should civilian casualties ensue from an illegal attempt to shield a military objective, their blood will be on the hands of

the belligerent party that abused them as human shields.<sup>76</sup> The long and the short of it is that a belligerent party is not vested by the law of international armed conflict with the power to block an otherwise lawful attack against military objectives by deliberately placing civilians in harm's way.<sup>77</sup>

The prohibition of placing civilians as human shields around a military objective applies to all belligerent parties. Even though this has become a *modus operandi* typical of terrorists, there are multiple ways in which regular armed forces may be tempted to employ analogous tactics to facilitate military operations. The issue arose before the Supreme Court of Israel (per President Barak), in 2006, in the *Early Warning* case.<sup>78</sup> The Court had to determine the legality of an “Early Warning Procedure” (adopted by the Israel Defense Forces (IDF)) whereby, when a terrorist has been cornered and besieged, a local resident would be encouraged to volunteer (provided that no harm to the messenger was anticipated) in order to relay a warning and a call to surrender so as to avoid unnecessary bloodshed.<sup>79</sup> The “Early Warning Procedure” drew criticism from outside observers<sup>80</sup> and it was nullified by the Court. President Barak—relying on Article 28 of Geneva Convention (IV) and on Article 51(7) of Protocol I (although Israel is not a contracting party to Protocol I)—stressed that the IDF was not allowed to use protected persons as human shields and that, therefore, the assistance of a local resident could certainly not be required coercively.<sup>81</sup> But what about assistance offered voluntarily in circumstances where this is not expected to place the person concerned in jeopardy? President Barak ruled against the “Early Warning Procedure” on four grounds: (i) protected persons must not be used as part of the military effort of the occupying power, (ii) everything must be done to separate the civilian population from combat operations, (iii) voluntary consent in these circumstances is often suspect, and (iv) it is not possible to tell in advance whether the activity of the protected person puts him in danger.<sup>82</sup>

Generally speaking, President Barak’s reasoning is persuasive. Yet, he did not explain why such assistance cannot be offered by a close relative—especially, a mother or a father—of a terrorist besieged in a building that is about to be stormed (with the likelihood of death in action of the terrorist), when the initiative is taken by, for example, the parent who begs to be given a chance to persuade the besieged son to surrender and save his life.<sup>83</sup> In such exceptional circumstances, there is little if any danger to the life of the parent, and humanitarian considerations actually tip the balance in favor of allowing the requested intercession to take place.

In conclusion, this article should show that, although the protection of civilians is a basic tenet of the international law of armed conflict, a civilian cannot take that protection for granted. There are many ways in which civilian protection will not render practical assistance, and a civilian would become a victim of war

inadvertently (due to collateral damage). But, above all, civilian protection can be lost if the person who purports to benefit from it crosses a red line by directly participating in hostilities. He may then be targeted, and this need not be done in an anonymous fashion. Absent perfidy, the bullet that kills him may lawfully have his name engraved on it.

### **Notes**

1. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).
2. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) (2 volumes: Volume I, Rules; Volume II, Practice (2 Parts)).
3. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in DOCUMENTS ON THE LAWS OF WAR* 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter Protocol I].
4. HENCKAERTS & DOSWALD-BECK, *supra* note 2, Vol. I, at 17.
5. See Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 ISRAEL YEARBOOK ON HUMAN RIGHTS 1, 8–9 (2006).
6. HENCKAERTS & DOSWALD-BECK, *supra* note 2, Vol. I, at 11.
7. On the issues of retreating troops and individual targeting, see YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 94–95 (2004).
8. Hague Regulations, annexed to Hague Convention IV Respecting the Laws and Customs of War on Land reg. 23(c), Oct. 18, 1907; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 12, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention (I)]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 12, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention (II)]; all *reprinted in DOCUMENTS ON THE LAWS OF WAR*, *supra* note 3, at 69, 77; 197, 201; and 222, 226, respectively.
9. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, *reprinted in DOCUMENTS ON THE LAWS OF WAR*, *supra* note 3, at 671, 676 [hereinafter Rome Statute].
10. See Protocol I, *supra* note 3, art. 49(1), at 447.
11. See Knut Dörmann, *The Applicability of the Additional Protocols to Computer Network Attacks: An ICRC Viewpoint*, in INTERNATIONAL EXPERT CONFERENCE ON COMPUTER NETWORK ATTACKS AND THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW 139, 142–43 (Karin Byström ed., 2005).
12. See Protocol I, *supra* note 3, art. 51(2), at 448.
13. See Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 105, 157 (Dieter Fleck ed., 1995).
14. See Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of The Hague)*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 93, 118 (United Nations Educational, Scientific and Cultural Organization ed., 1988).
15. On indiscriminate attacks, see Protocol I, *supra* note 3, art. 51(4)–(5), at 448–49.
16. Protocol I, *supra* note 3, at 450.

17. *Id.*
18. *Id.* at 449.
19. Rome Statute, *supra* note 9, at 676.
20. See UNITED KINGDOM (UK) MINISTRY OF DEFENCE, MANUAL OF THE LAW OF ARMED CONFLICT para. 5.4.4 (2004) [hereinafter UK MANUAL].
21. Marco Sassòli, *Targeting: The Scope and Utility of the Concept of ‘Military Objectives’ for the Protection of Civilians in Contemporary Armed Conflicts*, in NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 181, 204 (David Wippman & Matthew Evangelista eds., 2005) [hereinafter NEW WARS].
22. See Claude Pilloud & Jean Pictet, *Article 51 – Protection of the Civilian Population*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 613, 626 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).
23. Christopher Greenwood, *A Critique of the Additional Protocols to the Geneva Conventions of 1949*, in THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW 3, 11 n.29 (Helen Durham & Timothy L. H. McCormack eds., 1999).
24. See LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 160 (2d ed. 2000).
25. Protocol I, *supra* note 3, at 739.
26. Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 445, 462 (2005).
27. Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES: SYMPOSIUM IN HONOUR OF KNUT IPSEN 11, 42 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007).
28. Protocol I, *supra* note 3, at 453.
29. *Id.*
30. FRITS KALSHOVEN, REFLECTIONS ON THE LAW OF WAR: COLLECTED ESSAYS 553 (2007).
31. See Protocol I, *supra* note 3, arts. 76(1)–77(1), at 466.
32. See *id.*, art. 15, at 431.
33. See Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 373.
34. See Protocol I, *supra* note 3, art. 53, at 450.
35. *Id.*
36. See, e.g., common Article 3(1) to Geneva Convention (I), *supra* note 8, at 198; Geneva Convention (II), *id.* at 223; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 244, 245 [hereinafter Geneva Convention (III); Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, reprinted in *id.* at 301, 302 [hereinafter Geneva Convention (IV)].
37. See, e.g., Additional Protocol I, *supra* note 3, art. 8(a), at 426.
38. Cf. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 629 (Sept. 2, 1998).
39. HCJ [High Court of Justice] 769/02, Public Committee against Torture in Israel et al. v. Government of Israel et al. para. 30. (A full translation is available in 46 INTERNATIONAL LEGAL MATERIALS 375 (2007)).
40. *Id.*, para. 31.
41. On unlawful combatants, see DINSTEIN, *supra* note 7, at 27–44.
42. HENCKAERTS & DOSWALD-BECK, *supra* note 2, Vol. I, at 22.

43. Geneva Convention (IV), *supra* note 36, at 303.
44. See Kenneth Watkin, *Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict*, in NEW WARS, *supra* note 21, at 137, 154–57.
45. HCJ 769/02, *supra* note 39, paras. 30, 38.
46. *Id.*, paras. 39–40.
47. See Pilloud & Pictet, *supra* note 22, at 613, 619.
48. HCJ 769/02, *supra* note 39, para. 34.
49. See Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 17 (2004).
50. HCJ 769/02, *supra* note 39, para. 40.
51. *Id.*, para. 39.
52. FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 99–100 (3d ed. 2001).
53. HCJ 769/02, *supra* note 39, para. 35.
54. Protocol I, *supra* note 3, at 448.
55. KALSHOVEN, *supra* note 30, at 73–74, 214.
56. Cf. Protocol I, *supra* note 3, art. 50(3), at 448.
57. Hague Regulations, *supra* note 8, at 77.
58. Protocol I, *supra* note 3, at 442.
59. MODEL MANUAL ON THE LAW OF ARMED CONFLICT FOR ARMED FORCES para. 1013.2–3 (A.P.V. Rogers & P. Malherbe eds., 1999) [hereinafter MODEL MANUAL].
60. See A.P.V. ROGERS, LAW ON THE BATTLEFIELD 11–12 (2d ed. 2004).
61. Interestingly enough, the MODEL MANUAL (*supra* note 59)—coauthored by General Rogers—states that it is prohibited for civilians to act “as drivers delivering ammunition to firing positions” (para. 601.2.b).
62. HCJ 769/02, *supra* note 39, para. 35.
63. *Id.*, para. 40.
64. *Id.*, para. 46.
65. *Id.*, para. 60.
66. *Id.*, paras. 42–46.
67. Geneva Convention (IV), *supra* note 36, at 312.
68. Protocol I, *supra* note 3, at 449.
69. HENCKAERTS & DOSWALD-BECK, *supra* note 2, Vol. I, at 337.
70. Rome Statute, *supra* note 9, at 678.
71. HCJ 769/02, *supra* note 39, para. 36.
72. Michael N. Schmitt, *War, Technology and the Law of Armed Conflict*, in THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE 137, 177 (Anthony M. Helm ed., 2006) (Vol. 82, US Naval War College International Law Studies).
73. Protocol I, *supra* note 3, at 449.
74. See Louise Doswald-Beck, *The Civilian in the Crossfire*, 24 JOURNAL OF PEACE RESEARCH 251, 257 (1987).
75. See UK MANUAL, *supra* note 20, para. 5.22.1.
76. See W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 162–63 (1990).
77. See Andrew D. McClintock, *The Law of War: Coalition Attacks on Iraqi Chemical and Biological Weapon Storage and Production Facilities*, 7 EMORY INTERNATIONAL LAW REVIEW 633, 663–64 (1993).

78. HCJ 3799/02, Adalah – Legal Center for Arab Minority Rights in Israel et al. v. Commander of the Central Region et al. (2007).

79. *Id.*, paras. 5–7.

80. See Roland Otto, *Neighbours as Human Shields? The Israel Defense Forces' "Early Warning Procedure" and International Humanitarian Law*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 771–86 (2004).

81. HCJ 3799/02, *supra* note 78, paras. 21–22.

82. *Id.*, para. 24.

83. The possibility was raised by Deputy President Cheshin in paragraph 3 of his Separate Opinion, *id.*

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## The Treatment of Detainees and the “Global War on Terror”: Selected Legal Issues

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David Turns\*

### *Introduction*

This article will address selected legal issues relating to the treatment of detainees<sup>1</sup> in the context of the “Global War on Terror” as a “hook” on which to hang some ideas of more general application and significance about the international legal framework of the “war.” Some general (i.e., *jus ad bellum*) international law aspects of the parameters of that framework have already been debated in the literature,<sup>2</sup> but the perspective adopted herein is of more specialist focus inasmuch as it concentrates on the practical issue that should resonate in the mind of all coalition military and associated personnel since the disclosure of ill-treatment of detainees in the custody of US and British forces in Iraq at Abu Ghraib and elsewhere:<sup>3</sup> namely, once suspects in the “War on Terror” are captured, in accordance with what rules and legal standards are they to be treated? The broader, fundamental, more theoretical (but no less important) issue lurking behind this question of detailed substance is one of the utmost practical significance for personnel deployed to military counterterrorist operations in the field in the setting of the “Global War on Terror”: does the “War on Terror” constitute an armed

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conflict in the sense of international law? And if so, what kind of armed conflict is it: international, non-international or something else?

The premise contained herein, in a nutshell, is that military and political decisionmakers in the coalition countries (principally, for the purposes of this article, the United States and the United Kingdom) have mentally placed the proverbial “chicken before the egg,” in that they have completely failed to consider the very real implications that these considerations have on armed forces from a legal point of view. When soldiers are deployed on military operations, they need to know the context of and legal framework governing their actions. When in action against “terrorists” in Afghanistan, are coalition troops subject to (and expected to apply) the 1949 Geneva Conventions,<sup>4</sup> or Additional Protocols I or II thereto?<sup>5</sup> If so, do they apply all their provisions, or only some of them? The legal problem has been particularly acute when armed forces have been given instructions which, while vague on details, have tended to undermine respect for the law of armed conflict in general.<sup>6</sup> As one noted former member of the US armed forces has succinctly put it:

I can understand why some administration lawyers might have wanted ambiguity so that every hypothetical option is theoretically open, even those the President has said he does not want to exercise. But war doesn’t occur in theory and our troops are not served by ambiguity. They are crying out for clarity.<sup>7</sup>

The structure of this article will be, first, to consider some specific issues in current legal proceedings in both the United Kingdom and the United States regarding treatment of detainees in custody, before moving to the broader picture of the general legal framework and classification of the “Global War on Terror.” The latter discussion will involve a brief review of recent relevant decisions by the US and Israeli Supreme Courts as well as a comparison with the situation confronted by British security forces in Northern Ireland during the “Troubles”<sup>8</sup> as a limited predecessor for such a “war.” At the end, we will return to the specific starting point about legal standards for the treatment of detainees in military custody in light of the foregoing discussion about the nature and classification of the conflict, and draw some conclusions with suggestions for a possible way forward in what has become a veritable legal and moral minefield.

### *Recent Legal Developments in the United Kingdom*

#### **The Al-Skeini Litigation**

On June 13, 2007 the House of Lords (sitting in its judicial capacity as the highest court in the United Kingdom) gave its judgment in a long-running saga

concerning the treatment of detainees in Iraq, namely, the *Al-Skeini* case.<sup>9</sup> Claims for compensation are now being brought by the family of Baha Mousa against the British Ministry of Defence as a direct result of this judgment by the House of Lords,<sup>10</sup> although it represents the final stage in the instant litigation.

In the *Al-Skeini* affair there have been two separate limbs: the civil proceedings which culminated in the House of Lords decision, and military proceedings at court-martial. The situation which gave rise to both sets of proceedings involved the deaths of six Iraqi civilians at the hands of British troops in Basra between August and November 2003—in other words, during the period in which the United Kingdom, along with the United States, was internationally recognized as being in belligerent occupation of Iraq.<sup>11</sup> The court-martial case will be mentioned further below. The applicants in the civil litigation<sup>12</sup> were close relatives of the six dead Iraqi civilians. They sought an order of judicial review against the Secretary of State for Defence by way of challenge to his refusal to order an independent public inquiry into the circumstances in which their relatives died and his rejection of liability to pay compensation for their deaths. Five of the deceased were shot by British troops while exchanging fire with Iraqi insurgents, during patrols or house searches,<sup>13</sup> but the most famous one is the sixth, whose circumstances were somewhat different. Baha Mousa was a young hotel receptionist who was taken into custody by British troops during a search of his hotel. Within thirty-six hours he was dead, apparently having been beaten to death by British troops while in their custody at the military base of Darul Dhyafa in Basra.<sup>14</sup>

The legal issue in the case turned on the extraterritorial application of the Human Rights Act 1998 (HRA),<sup>15</sup> which is the domestic British incorporation of the United Kingdom's international obligations under the European Convention of Human Rights (ECHR).<sup>16</sup> The claimants' arguments were essentially that Iraqi civilian detainees in British military custody in Iraq were entitled to the protection of the HRA and therefore (indirectly) of the ECHR; the core question was thus one of jurisdiction. Throughout the earlier proceedings in the Divisional Court and the Court of Appeal,<sup>17</sup> and also in the House of Lords, a clear distinction was drawn between the five Iraqis who were shot on the street or in house searches by British troops and the one, Baha Mousa, who died in the actual custody of British troops.

This distinction was necessitated by the Convention's own insistence that “the High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in . . . this Convention.”<sup>18</sup> In a confusing series of cases decided by the European Court of Human Rights (ECtHR), the Court introduced and elaborated upon a notion of “effective control” over territory for the purposes of ECHR jurisdiction outside the “*espace juridique*”<sup>19</sup> of the Convention, and a fundamental tension developed between two alternative conceptions of the extraterritorial

application of the ECHR during military operations by armed forces of ECHR State parties in States or other territorial entities that were not party to the Convention.<sup>20</sup> This was clearly the case in Iraq, as that State is not and never has been a party to the ECHR, whereas the United Kingdom is. The fundamental question, therefore, was whether the actions of British troops, deployed on military operations outside the United Kingdom, could be subject to provisions of the Convention (by way of the HRA, which applies to all “public authorities” of the United Kingdom and makes it unlawful for such authorities to act in a way that is incompatible with a right under the ECHR).<sup>21</sup>

Essentially what was conceded by the Ministry of Defence, and in the final stage of the House of Lords hearings<sup>22</sup> was no longer contentious, was that the ECHR was in principle applicable to these cases. The first five deceased, however, because they were shot on the street or during patrols or house searches but were not in the physical custody of British troops, were held not to fall within the jurisdiction of the UK courts for the purposes of the human rights legislation. In the House of Lords, the government was appealing against the findings (in both the Divisional Court and the Court of Appeal, albeit with slightly different reasoning) that it was liable in respect to Baha Mousa’s death and that it could or should be ordered to hold the requested independent public inquiry into the circumstances thereof.

Throughout the proceedings in *Al-Skeini*, at all three court levels, it was common ground that there were two possible legal reasons as to why the Iraqi claimants should be brought within the jurisdiction of British human rights laws, even though they were not citizens of the United Kingdom and the acts in question occurred outside the United Kingdom while British troops were engaged in military operations. These reasons were that, under the ECtHR decision in *Bankovic*,<sup>23</sup> extraterritorial jurisdiction of the ECHR could be based on either

- (1) the effective control of a State over a territory and its inhabitants, either as a result of military occupation (whether lawful or unlawful in general international law), or with the consent, acquiescence or invitation of the government of that territory, such that the State in effective control actually exercises all or some of the public powers normally to be exercised by the government of that territory. This approach to extraterritorial jurisdiction is referred to for convenience as the “effective control of an area” (ECA) argument and was based on the ECtHR jurisprudence in the line of cases following *Loizidou*;<sup>24</sup> or
- (2) the exercise of authority or control over a State’s individuals by the activities of another State’s official agents in its embassies, consulates,

military bases or prisons, or on board aircraft or vessels registered in or flying the flag of that State, wherein agents of the State are exercising the authority of the State extraterritorially in a foreign country. This approach to extraterritorial jurisdiction is referred to for convenience as the “State agent authority” (SAA) argument, and was based on an alternative jurisprudence of the ECtHR as expressed in *Drozd and Janousek v. France and Spain*.<sup>25</sup>

The Divisional Court had limited the applicability of the ECA argument to territory within the *espace juridique* of the Convention and applied a narrow construction of the SAA argument, holding that it applied only in relation to “embassies, consulates, vessels and aircraft and . . . a prison.”<sup>26</sup> Within those restrictive parameters, the case of Baha Mousa alone was considered justiciable. The SAA argument was also the preferred view of the Court of Appeal, although it additionally applied a broader interpretation of the ECA argument than the Divisional Court, in the sense that the majority opined that the ECA theory could apply anywhere in the world, even outside the *espace juridique* of the Convention, so long as the territory was under effective control. The appeals court was also more generous in its view of the SAA argument. It relied heavily on the decision in *Issa and Others v. Turkey*,<sup>27</sup> a case in which the ECtHR gave “an unequivocal statement of SAA responsibility in a military context”<sup>28</sup> (*Issa* concerned the deaths of a number of Iraqi shepherds, allegedly at the hands of Turkish soldiers operating against Kurdish guerrillas in northern Iraq). The Court of Appeal effectively held, largely on public policy grounds, that “Article 1 [of the Convention] could not be interpreted so as to allow a State party to perpetrate violations of the ECHR on the territory of another State which it could not perpetrate on its own territory”<sup>29</sup> and that the SAA theory applied whenever the individual in question was under the control and authority of the relevant State agents anywhere in the world.

However, in the House of Lords judgment in *Al-Skeini*, a majority of the Law Lords was uncomfortable with the extremely broad approach of the Court of Appeal, and chose to retrench the position considerably. In the leading judgment, Lord Brown dismissed the expansive extraterritorial application of the ECHR regime proposed by the Court of Appeal in reliance on *Issa* as

altogether too much. It would make a nonsense of much that was said in *Bankovic* [as to the Convention being an essentially regional instrument that was not designed to operate throughout the world] . . . . It would, indeed, make redundant the principle of effective control of an area: what need for that if jurisdiction arises in any event under a general principle of “authority and control” irrespective of whether the area is (a) effectively controlled or (b) within the Council of Europe?<sup>30</sup>

In connection with military forces and the law of armed conflict, Lord Brown noted that the requirements of effective occupation required that the occupying power respect the laws in force, rather than introducing new laws and enforcement mechanisms; indeed, in most parts of the world outside Europe the probability would be that ECHR rights would be incompatible with local law in any event.<sup>31</sup> The cases of the first five claimants were therefore conclusively dismissed as falling outside the United Kingdom’s jurisdiction for human rights purposes, while in respect to the sixth claimant, Lord Brown agreed that Baha Mousa’s case did indeed fall within the scope of the United Kingdom’s obligations under the ECHR, but “only on the narrow basis found established by the Divisional Court, essentially by analogy with the extra-territorial exception made for embassies.”<sup>32</sup>

Although it is perhaps still too early to make a full evaluation of the impact of the final decision in *Al-Skeini*, and a claim against the Ministry of Defence pursuant to the judgment in the litigation has only recently been made public,<sup>33</sup> it is surely a decision of enormous significance because it means that British forces, when deployed outside the United Kingdom on certain kinds of military operations, effectively will be carrying the obligations of the ECHR and the HRA with them. In other words, for the United Kingdom (and all other States that are party to the ECHR) questions of human rights will become increasingly important in situations where British troops are either in belligerent occupation of foreign territory or stationed in any foreign territory in a situation other than full-scale international armed conflict. This is a trend that has been gathering strength for some years; as the International Court of Justice has put it:

[T]he protection offered by human rights conventions does not cease in time of armed conflict . . . As regards the relationship between international human rights law and international humanitarian law, there are . . . three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.<sup>34</sup>

It is a fact that a major part of contemporary culture, especially in the West, is the demand for redress after injury. In the context of armed conflict, although there is a specialized mechanism for calling wrongdoers to account by criminal prosecution on charges of war crimes or similar, that is a lengthy and generally unsatisfying process from the victims’ perspective. All too often soldiers accused of criminal conduct are either acquitted (which may of course be for a variety of reasons, some more readily understandable to the world outside the courtroom than others) or not even brought to trial. This is an allegation that might be made in the current context of securing accountability for misconduct by British troops in

Iraq,<sup>35</sup> but it is nothing new: there were notoriously few prosecutions of German military officers and soldiers in the *Reichsgericht* at Leipzig for offenses allegedly committed in World War I, and most of those that took place resulted either in acquittals or in derisorily lenient prison sentences.<sup>36</sup> The growth in the importance of human rights law in relation to situations of occupation or other military deployment is inevitable, given that civil litigation for compensation is easier for claimants to secure than criminal trials. In the United Kingdom, at least, we will doubtless be seeing more of these human rights cases for compensation being brought against the Ministry of Defence the longer our forces stay in theater.

All of which is not to say that British forces will no longer be applying the law of armed conflict when they are deployed on operations abroad or will be looking at every military situation through the distorting lens of human rights obligations; it simply means that in certain limited situations, where for example they may be occupying territory or they may be based in a foreign State with the consent of that State, as is the case with both Iraq and Afghanistan, they are under an obligation to apply the ECHR and HRA in relation to persons who are in their custody. But it would be inconceivable for them to be required to apply human rights law to field operations on the battlefield, where the law of armed conflict is and will remain the applicable *lex specialis*.

### Court-Martial Proceedings

Since the period of belligerent occupation in Iraq by the Coalition Provisional Authority in 2003–04, there have been two principal British courts-martial which resulted in the convictions of soldiers accused of transgressions in relation to the treatment of detainees in Iraq, as well as two other high-profile court-martial cases that failed for lack of evidence. The same facts that led to the civil proceedings in the *Al-Skeini* litigation, in relation to the death of Baha Mousa in British military custody, resulted in the court-martial of seven servicemen in the United Kingdom in 2006. The trial, although not entirely a success, made legal history on two counts: it involved the first instance of a British soldier pleading guilty to a war crimes charge under the International Criminal Court Act 2001<sup>37</sup> and it saw the first modern instance of criminal charges being brought against senior British Army officers for dereliction of duty—in international law the basis for such a charge would have been the doctrine of command responsibility. Four soldiers of The Queen's Lancashire Regiment were charged with inhumane treatment of the Iraqi civilians in September 2006. Of these, one (Corporal Donald Payne) was additionally charged under the Army Act 1955<sup>38</sup> with manslaughter and perverting the course of justice, and another (Sergeant Kelvin Stacey) was charged with actual bodily

harm or assault. Two Intelligence Corps officers were charged with negligently performing a duty, as was Colonel Jorge Mendonca, the regimental commander.<sup>39</sup>

Corporal Payne pleaded not guilty to manslaughter and perverting the course of justice but guilty to the charge of inhumane treatment of civilians and was sentenced to dismissal from the Army and one year's imprisonment in consequence.<sup>40</sup> The other six accused were all acquitted due to lack of evidence.<sup>41</sup> Although the charge against Colonel Mendonca was eventually thrown out,<sup>42</sup> he was notable for being the highest-ranking British military officer in modern history to be charged with a war crime, and particularly on command responsibility principles. When he subsequently decided to resign from the Army, despite his acquittal, rather than face possible further internal disciplinary action, there was much criticism of the Attorney General and the Army Prosecuting Authority, who were accused of treating him as a scapegoat. There is clearly a fine line to tread here. On the one hand, if there was not enough evidence to convict Colonel Mendonca of any crime, then it was obviously right that he was acquitted. But the criticism of putting him on court-martial simply “because the Army wanted to put an officer on trial”<sup>43</sup> is beside the point: the system of hierarchy and command responsibility, whereby every commander is legally responsible for the troops under his command, is a lynchpin of the modern law of armed conflict. The case of *Payne and Others* teaches us that we should not shy away from calling senior officers to account when troops under their command commit criminal offenses. If the officer either ordered the crimes or knew or should have known that they were occurring and “failed to take all necessary and reasonable measures” to “prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution”<sup>44</sup> then he must face investigation and, if appropriate, prosecution. It will not do to concentrate on the ordinary soldiers and non-commissioned officers who commit the actual abuse; they are easy targets for a prosecution.

The *Al-Skeini* litigation and its associated courts-martial, although the highest-profile matter concerning treatment of detainees by British forces abroad, is not the only case that we have had in the United Kingdom. Two specific cases have gone to courts-martial within the last three years, although one of them did not result in a full trial as Fusilier Gary Bartlam, the soldier concerned, pleaded guilty.<sup>45</sup>

In *The Queen v. Mark Paul Cooley, Darren Paul Larkin and Daniel Kenyon*,<sup>46</sup> the three accused (all non-commissioned officers in The Royal Regiment of Fusiliers) faced a total of nine charges under the Army Act.<sup>47</sup> These included the same charges as in *Bartlam* in relation to the same facts and others, namely, forcing two detainees “to undress in front of others” and forcing two naked males “to simulate a sexual act.” In addition, offenses of conduct to the prejudice of good order and military discipline (contrary to Section 69 of the Army Act) and committing a civil

offense (contrary to Section 70 of the Army Act) were also charged. The Section 69 charges related to simulating the punching and kicking of an unknown male and (in the case of Corporal Kenyon, the most senior of the defendants) failing to report unlawful acts by soldiers under his command. The Section 70 charge involved the assault and beating of an unknown male who was being detained by British forces. All the incidents, both in *Bartlam* and in *Cooley, Larkin and Kenyon*, arose out of an operation in “Camp Breadbasket” in the British Zone of Iraq near Basra in May 2003, in which British troops rounded up a number of Iraqi civilians and proceeded to “work them hard” (as the British commanding officer apparently instructed his men). This vague order, coupled with apparent failures in reporting and supervision of conduct, led to several situations in which Iraqi detainees were physically and mentally abused by British soldiers. The specific acts alleged included punching and kicking detainees, stripping them and forcing them to simulate sexual acts. One soldier stood on a detainee; a group of others tied another detainee to a forklift truck and raised him off the ground. Astonishingly, some of these misdeeds were photographed by some of the soldiers, and it was when one of the latter took his film to be developed back in Britain that the matter was reported to the police for investigation. A particularly disturbing aspect of the case was the failure to bring charges against the officer who gave the original order and subsequently failed to supervise his men. However, Camp Breadbasket covered quite a large area and the particular abuses that were the subject of the court-martial occurred in a discrete area of the camp some distance from where the commanding officer was located, such that it would have been infeasible for him to have known what was going on. Consequently, the Army Prosecuting Authority did not feel that there was sufficient evidence to charge him with an offense under the doctrine of command responsibility. Of the actual defendants in the case, Larkin pleaded guilty to assault and was jailed for 140 days, while Kenyon and Cooley were both convicted and sentenced to eighteen months’ and two years’ imprisonment, respectively.<sup>48</sup> Cooley’s sentence was subsequently reduced to four months’ imprisonment by the Army Reviewing Authority.<sup>49</sup>

There has been much generalized concern as to allegations of ill-treatment of civilians (in some cases allegedly amounting to torture) by British troops in Iraq and the subsequent investigations into such conduct by those troops.<sup>50</sup> The issue remains one of the greatest topical interest and a number of investigations are currently ongoing.<sup>51</sup> Only time will tell how many more cases arise and can be prosecuted.

### *Recent Legal Developments in the United States*

The long saga of detainee matters in the US courts has continued unabated and there have been interesting developments in two cases in particular: *United States v. Hamdan* and *United States v. Khadr*.<sup>52</sup> In June 2007, two different US military judges in two different sets of proceedings in military commissions threw out all charges in the two cases, on the grounds that the accused had not been properly determined to be “unlawful enemy combatants” in terms of the Military Commissions Act of 2006; therefore all the charges were thrown out for lack of jurisdiction. In respect to Hamdan, the judge held that the Combatant Status Review Tribunal’s (CSRT) determination that he was an “enemy combatant” was made for the purpose of determining whether or not he was properly detained, rather than whether or not he was subject to trial by military commission, and using a different legal standard. He concluded:

[Hamdan] is either entitled to the protections accorded to a Prisoner of War, or he is an alien unlawful enemy combatant subject to the jurisdiction of a Military Commission, or he may have some other status. The Government [has] failed to determine, by means of a competent tribunal, that he is an “unlawful enemy combatant” using the definition established by Congress . . . .<sup>53</sup>

In respect to Khadr, the judge declared that “the military commission is not the proper authority, under the provisions of the [Military Commissions Act], to determine that Mr. Khadr is an unlawful enemy combatant in order to establish initial jurisdiction for this commission to try Mr. Khadr.”<sup>54</sup> The Court of Military Commissions Review (CMCR), however, has since reversed that ruling on the grounds that the distinction between “enemy combatant” and “unlawful enemy combatant” status was purely semantic and that the judge had erred in his conclusion that a CSRT determination of “unlawful enemy combatant” status was a prerequisite to trial by military commission, because the military commission itself had jurisdiction so to determine.<sup>55</sup> The CMCR accordingly reinstated the charges against Khadr, and the Department of Defense has now indicated that it intends to press ahead “expeditiously” with the full prosecutions of Khadr and other detainees in the same position.<sup>56</sup> Although some might have thought that the twin rulings in June would provide a substantive obstacle to the entire system for the prosecution of detainees in the “War on Terror,” throwing it into disarray and causing a general rethink on the part of the Pentagon, clearly the setback to the Administration’s plans was only a temporary, procedural one.

### *The “Global War on Terror”: Comments on the General Legal Framework*

In the last part of this article I will consider the broader issues mentioned at the beginning, namely, the broader international legal framework that might govern the “Global War on Terror.” In short, is it an armed conflict or not? And if it is, then what kind of armed conflict is it? This is prompted by another detainee case that has been heard recently in the United States. It is not a military case but a civilian case: *Al-Marri v. Wright*,<sup>57</sup> in which the applicant is a civilian citizen of Qatar who was legally resident in the United States. Al-Marri had been detained by US military authorities without charge and had been so detained for some four years. In brief, the Court of Appeals ruled that he could not be detained indefinitely by the military authorities and was entitled to *habeas corpus*. However, I do not intend to dwell on that aspect of the case, but rather on something else that the Court said, almost as an aside. It is in a couple of sentences in one of the paragraphs buried in the middle of the Court’s opinion; it has apparently escaped the attention of most observers.

The Court in *Al-Marri* said that because the US Supreme Court had determined in *Hamdan v. Rumsfeld*<sup>58</sup> that the armed conflict with Al-Qaeda is a conflict “not of an international character” and because there are no categories of combatants in non-international conflicts, neither lawful combatants nor unlawful combatants, the Military Commissions Act did not apply to Al-Marri and the only remaining possible classification of him was that he was a civilian.<sup>59</sup> Because he was a civilian and legally resident in the United States, he was entitled to certain constitutional protections; as a civilian, he could not be transformed “into an enemy combatant subject to indefinite military detention, any more than allegations of murder in association with others while in military service permit the Government to transform a civilian into a soldier subject to trial by court martial.”<sup>60</sup> This is interesting because it represents, in my opinion, one of the two best options for classifying detainees in the “War on Terror” for the purposes of ensuring that they receive the benefit of the best possible treatment in captivity.

This leads to a comparison of the *Hamdan* decision with the Israeli Supreme Court’s decision on targeted killings<sup>61</sup> and with certain aspects of the situation that the United Kingdom had in relation to Northern Ireland. The view of the plurality in *Hamdan* was that “there is at least one provision of the Geneva Conventions that applies here, even if the relevant conflict is not one between signatories.”<sup>62</sup> This the plurality identified as Common Article 3 of the Geneva Conventions, which applies as a minimum standard for humanitarian protection in all armed conflicts, although on the face of it the provision is directed specifically to armed conflicts not of an international character, in which it provides basic protection to

persons taking no active part in hostilities, including those placed *hors de combat* by wounds or sickness and those who have surrendered or have otherwise been detained. The key to this part of the decision in *Hamdan* was the phrase “armed conflict not of an international character,” a phrase which the plurality held to have a meaning “in contradistinction to a conflict between nations”: effectively a negative definition, such that it could be interpreted as bringing within its ambit any and all armed conflicts that do not fit within the traditional inter-State armed conflict paradigm. The plurality asserted that this was the “literal meaning” of the phrase “armed conflicts not of an international character,” and that in any event the intention behind the provision, while ostensibly restricted specifically to non-international armed conflicts in the classic sense of international law, was for the purposes of its scope of application and protection to be as wide as possible.<sup>63</sup> Of the dissenting opinions in *Hamdan*, only Justice Thomas dealt directly with the issue of the nature of the conflict between the United States and Al-Qaeda. He held that “the conflict with Al-Qaeda is international in character, in the sense that it is occurring in various nations around the globe. Thus, it is also occurring in the territory of more than one of the High Contracting Parties.”<sup>64</sup> Although he described the plurality’s interpretation of the phrase “armed conflicts not of an international character” as “admittedly plausible” he nevertheless felt constrained by a judicial duty of deference to the Executive’s determination of matters of war and peace.<sup>65</sup>

So the plurality of the US Supreme Court held that the totality of the “Global War on Terror” is an armed conflict not of an international character, proceeding from what was essentially a functionalist perspective: the necessity to determine the legality of the military commissions established by President Bush, and applying a literalist reading of the letter of the law. Turning now to a comparison with the decision of the Israeli Supreme Court in respect to a much more limited scenario—namely, Israel Defense Forces (IDF) actions against Palestinian militants in the Occupied Palestinian Territories and in areas under the jurisdiction of the Palestinian Authority—a much more holistic approach was applied by the Court in seeking to explain the whole legal framework underpinning IDF operations in this theater. The Israeli Supreme Court reached a diametrically opposite conclusion to that of its American counterpart, namely, that the conflict between Israel and the Palestinians is an international armed conflict.

Most international lawyers outside the Middle East would have thought that that is a counterintuitive position to take, because normally for it to be an international armed conflict, there have to be two or more States, and the Palestinians are not a State in international law. So it looks a bit unlikely from that perspective, although there are other grounds on which it could be plausible. For example, areas that are still under Israeli occupation could be said to be still in a state of

international armed conflict by virtue of being under belligerent occupation. Conversely, the conflict between Israel and the Palestinians could not intuitively have been considered a non-international armed conflict either, because some parts of the Occupied Territories remain under the occupation of Israel and other parts are under the jurisdiction of the Palestinian Authority and in neither case are they legally part of the State of Israel. So it cannot be a non-international armed conflict, because it is not occurring on the territory of only one State. The classification of the armed conflict was a point of agreement between the petitioners and the State. The latter made a very interesting point in its submissions:

The question of the classification of the conflict between Israel and the Palestinians is a complicated question, with characteristics that point in different directions. In any case, there is no need to decide that question in order to decide the petition. That is because according to all of the classifications of armed conflict, the laws of armed conflict will apply to the acts of the State. These laws allow striking at persons who are a party to the armed conflict and take an active part in it, whether it is an international or a non-international armed conflict, and even if it belongs to a new category of armed conflict which has been developing over the last decade in international law: a category of armed conflicts between States and terrorist organisations. According to each of these categories, a person who is a party to the armed conflict and takes an active part in it is a combatant, and it is permissible to strike at him.<sup>66</sup>

I think this is interesting for a number of reasons, one of which in this context is that it amounts to saying that many of the rules in armed conflicts are now basically the same, irrespective of the classification of the conflict in question, so it is not necessary to worry too much about whether the conflict is international or not. This is certainly a tendency that has been gathering force, albeit in the slightly different context of application of penal sanctions for violations of the law of armed conflict, since the jurisprudence of the International Criminal Tribunal for the former Yugoslavia began to develop some twelve years ago. To the extent that the State of Israel, through its counsel in this litigation, expressed the same view or a variant thereof, it could be viewed as an example of the accumulation of *opinio juris* on this point.

The Supreme Court of Israel, nevertheless, did not choose to go down the particular path opened to it by the State's submissions on the character of the armed conflict between Israel and the Palestinians. Instead, it ruled simply that the applicable law was that governing international armed conflicts and it did so for two particular reasons:

- (1) the fact of the armed conflict crossing the frontiers of the State, i.e., the pre-1967 frontiers, and taking place within a context of belligerent occupation;<sup>67</sup> and
- (2) by reference to the military capabilities of modern terrorist organizations. This point is, I think, of more general application than the specific situation that the Court was dealing with.

The latter point, in particular, is quite innovative. The Court expressed it thus:

The fact that the terrorist organisations and their members do not act in the name of a State does not turn the struggle against them into a purely internal State conflict. Indeed, in today's reality, a terrorist organisation is likely to have considerable military capabilities. At times, they have military capabilities that exceed those of States. Confrontation with those dangers cannot be restricted within the State and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of an international character.<sup>68</sup>

The decisions of the US and Israeli Supreme Courts in these two cases represent two alternative classifications of the “War on Terror,” or at least certain aspects thereof, as an armed conflict. While I think that there is much to commend the contextual analysis that was adopted by the Israeli Court, the American approach seems somewhat literal by comparison. Nevertheless, at the very least the US Supreme Court decision might signal a resurgence of an emphasis on the usefulness of Common Article 3 of the Geneva Conventions.<sup>69</sup> That can be broadened for those States that are parties to Additional Protocol I to the “fundamental guarantees” contained in Article 75 thereof. What is innovative about the decision in *Hamdan* in this particular respect is that it applies Common Article 3 to what is not really a non-international armed conflict as traditionally understood in international law at all, but might rather be called a transnational armed conflict. That is to say, the conflict is neither specifically international nor specifically non-international in nature within the traditional framework of the law of armed conflict, but it is transnational because it occurs in more than one State in the world simultaneously within the same context of hostilities. Common Article 3, in any event, is the lowest common denominator for humanitarian protection: it should have the widest scope of application possible, which essentially means it should be applied in all armed conflicts, no matter how they are classified.

The Israeli decision, on the other hand, is seductive in the clarity and logic of its analysis. However, it is quite clear that the Court there was only seeking to deal with the situation as between Israel and Palestinian militants. Nevertheless, the

passages quoted above might be interpreted as suggesting that a broader, more sweeping statement of the law might have been intended, however peripherally, by the Court.

Let me very briefly consider the Northern Ireland example, which is often mentioned as a predecessor in some ways for dealing with the “Global War on Terror.” In terms of the latter phrase, the experience of Northern Ireland clearly shows that there is nothing new, at least rhetorically, in the use of such language. When the power of internment—*indefinite detention without charge or trial*—was introduced in the province in 1972, its Prime Minister, Brian Faulkner, said that Northern Ireland was “quite simply at war with the terrorist.”<sup>70</sup> The Irish Republican Army (IRA) tried to claim prisoner of war (POW) status for its operatives who had been detained by British security forces, a status which was not accepted by the British authorities.<sup>71</sup> Indeed, the perspective of the British government was that the situation in Northern Ireland did not amount to an armed conflict of any kind in the sense of international law; the legal framework within which it operated in the United Kingdom being that of Military Aid to the Civil Power, wherein the armed forces were deployed in Northern Ireland pursuant to a request from the Northern Ireland government, which felt that the normal police forces could not contain the escalating situation and needed military assistance to restore law and order. It could not in any event have been an international armed conflict because Northern Ireland is a part of the United Kingdom. It could not have been an Additional Protocol I situation, as a war of national liberation, even though that is what the IRA sought to claim, first, because the United Kingdom was not at the time a party to Additional Protocol I, and second, because the IRA failed to make the declaration that is required of a national liberation movement under Article 96(3). Finally, it could not have been a situation under Additional Protocol II, again because the United Kingdom was not at the time a party to that instrument. In any event, the threshold of application would not have been met by the IRA in terms of control of territory, and the violence was for the most part too sporadic and isolated to meet the Protocol’s requirements.

The contemporary British position in terms of the “Global War on Terror” as an armed conflict is that the United Kingdom does not accept the notion that such a “war” exists as an armed conflict of any classification in international law. Any determination as to the type of an armed conflict in which British forces are engaged will be made on a case-by-case basis, depending on the facts on the ground in each given situation.<sup>72</sup> The legal basis of the decision in any event is the international law definition of an international or non-international armed conflict, in conjunction with the facts on the ground. If British forces are in action against the government or other official forces of any other State, the situation will be dealt with as one of

international armed conflict. In any other situation in which British troops are deployed, the situation will be regarded as one of de facto non-international armed conflict. Thus, from the official UK point of view, hostilities that are currently taking place in Afghanistan and Iraq are in effect treated as internal conflicts in which the United Kingdom is participating on the side of the governments of those States. The conflict in Iraq, for example, is not a conflict between the British and Iraqi States: it is a conflict between the Iraqi State and Iraqi insurgents, and the former invited British troops to assist it in certain parts of Iraq in combating the insurgency. Although this might, again, seem a counterintuitive position to take, it is not entirely devoid of sense from a strictly legal perspective, in the same way that the US Supreme Court’s decision in *Hamdan* has a certain logic to it.

### *Concluding Remarks*

I think that there are six possibilities that we could consider in terms of the broad legal framework of the “Global War on Terror” in the sense of the law of armed conflict.

- (1) The “war” is an armed conflict and it is international in nature—that would essentially be an extension of what the Israeli Supreme Court held in the targeted killings case;
- (2) The “war” is an armed conflict and it is non-international in nature—that is what the US Supreme Court said in *Hamdan*;
- (3) The “war” is an armed conflict and it has a new kind of hybrid status which might be described as a “transnational armed conflict”<sup>73</sup>—the issue here is going to be that if we call it a “transnational armed conflict” what actual rules do we apply? While this looks attractive as a classification in some respects because it is factually realistic in terms of the actual situation on the ground, it is not ultimately that helpful because it does not tell us much about the details of the law to be applied;
- (4) The “war” is an armed conflict and its precise classification in terms of the law of armed conflict does not really matter because in any event we will apply the minimum yardstick of Common Article 3 and—if the State in question is a party to Additional Protocol I—we are also going to apply the fundamental guarantees contained in Article 75;

- (5) The “war” does not constitute an overarching armed conflict for the purposes of international law—the various counterterrorist military operations which have been taking place since September 2001 should be viewed as falling primarily within the framework of large-scale criminal law enforcement, albeit they are undertaken either largely or entirely by military forces; and
- (6) The “war” does not constitute an overarching armed conflict, but each individual counterterrorist military operation in the context thereof should be designated separately as either international or non-international in nature, depending on the international law definition and the facts on the ground—this is the position currently maintained by the British government.

Ultimately, the most important issue here is the practical one of the standards according to which detainees captured in counterterrorist military operations are treated. The fundamental point is that the purpose of the law of armed conflict in the context of detainee treatment has to be to provide the maximum amount of protection possible, and if that means applying Common Article 3 at the very least, then perhaps that is the best thing that we can do. But in some respects I would say that it should not even matter too much if we treat detainees as POWs. This is not the same thing as saying that they *are* POWs, just that we treat them *as if they were* POWs. It does not stop the State from prosecuting them after capture, and by doing so we would be applying the maximum possible humanitarian protection and would be complying with the spirit and letter of Geneva Convention III.<sup>74</sup>

There is no logical reason, other than State pride, for this to be taken as a commentary on the legitimacy or otherwise of the terrorist organizations—such attitudes are in any event outmoded by the contemporary paradigm of asymmetrical warfare and the inevitable diminution in the importance of reciprocity as a primary basis of obligation in the international law of armed conflict. I concede that the view expressed herein is unlikely to be widely adopted at the present time, but it seems to me to be a rational and practical one. At the end of the day, the law in war has to protect detainees, and what we need is not more law but agreement on the basic parameters of applying Common Article 3, what that means in practice, and firm and consistent application of Article 75 of Additional Protocol I for those States that are parties thereto.<sup>75</sup>

**Notes**

1. This article will not as such consider the preliminary issue of the status or classification of detainees under the international law of armed conflict, although that aspect of the analysis is of obvious relevance to the broader framework of the discussion. For a representative sample of the vast legal literature thereon, see George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 891 (2002); Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the “War on Terror,”* 44 HARVARD INTERNATIONAL LAW JOURNAL 301 (2003); Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency and the International Laws of Armed Conflict*, 55 AIR FORCE LAW REVIEW 1 (2004); John C. Yoo, *The Status of Soldiers and Terrorists under the Geneva Conventions*, 3 CHINESE JOURNAL OF INTERNATIONAL LAW 135 (2004); Derek Jinks, *The Declining Significance of POW Status*, 45 HARVARD INTERNATIONAL LAW JOURNAL 367 (2004); Marco Sassòli, *The Status of Persons Held in Guantánamo under International Humanitarian Law*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 96 (2004); Luisa Vierucci, *Is the Geneva Convention on Prisoners of War Obsolete? The Views of the Counsel to the US President on the Application of International Law to the Afghan Conflict*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 866 (2004); Joseph Blocher, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE LAW JOURNAL 667 (2006).

2. Again, the literature on *jus ad bellum* aspects of the “Global War on Terror” is extensive. For a representative sample, see Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 401 (2002); Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE JOURNAL OF INTERNATIONAL LAW 341 (2003); Greg Travalio & John Altenburg, *Terrorism, State Responsibility and the Use of Force*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 97 (2003); Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 AIR FORCE LAW REVIEW 87 (2004); Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors*, 56 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 141 (2007).

3. The various public reports, both from US official sources and international non-governmental sources, collectively summarize the substance of the mistreatment that is known to have occurred at Abu Ghraib and in other detention facilities under US or British control in Iraq. See, e.g., Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions [sic] in Iraq During Arrest, Internment and Interrogation (Feb. 2004), available at [www.globalsecurity.org/military/library/report/2004/icrc\\_report\\_iraq\\_feb2004.pdf](http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf); Article 15-6 Investigation of the 800th Military Police Brigade (Mar. 2004) (the “Taguba Report”), available at [www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm](http://www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm); Final Report of the Independent Panel to Review DoD Detention Operations (Aug. 2004) (the “Schlesinger Report”), available at [www.humanrightsfirst.org/us\\_law/PDF/abuse/Schlesinger\\_report.pdf](http://www.humanrightsfirst.org/us_law/PDF/abuse/Schlesinger_report.pdf).

4. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of

Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287. For the purposes of this article, only Geneva Convention III will be relevant to the discussion hereafter.

5. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

6. E.g., the infamous dismissal of much of the Geneva Conventions as “quaint” and “obsolete” by then-US Attorney General Alberto R. Gonzales in his Memorandum to the President Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), *reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 118 (Karen L. Greenberg & Joshua L. Dratel eds., 2005), available at [www.gwu.edu/~nsarchiv/NSAEBB127/02.01.25.pdf](http://www.gwu.edu/~nsarchiv/NSAEBB127/02.01.25.pdf).

7. 151 CONG. REC. S11062 (daily ed. Oct. 5, 2005) (statement of Senator John McCain).

8. The “Troubles” is the euphemistic term used to refer to the period between 1969 and 1998 in Northern Ireland, when high levels of violent activities by the Irish Republican Army (IRA) and other armed paramilitary groups on both the Nationalist/Catholic and Unionist/Protestant sides of the province’s sectarian divide necessitated the deployment of British military forces on the streets of the province to assist in the restoration and maintenance of law and order. The troops were initially deployed in August 1969 and, although the period of the “Troubles” can be said to have substantively ended in June 1998, when elections for the Northern Ireland Assembly took place against the background of a referendum approving the “Good Friday Peace Agreement” of April 1998 and ceasefires by most of the various paramilitary organizations active in the province, Operation BANNER (Army operations in Northern Ireland pursuant to the state of emergency that was declared in 1969) was only formally terminated in July 2007. See Defence News, Operation BANNER ends in Northern Ireland after 38 years (Aug. 1, 2007), [www.mod.uk/DefenceInternet/DefenceNews/DefencePolicyAndBusiness/OperationBannerEndsInNorthernIrelandAfter38Years.htm](http://www.mod.uk/DefenceInternet/DefenceNews/DefencePolicyAndBusiness/OperationBannerEndsInNorthernIrelandAfter38Years.htm).

9. Al-Skeini and Others v. Secretary of State for Defence, [2007] UKHL 26 [hereinafter Al-Skeini (HL)].

10. See Michael Evans, *Family of dead Iraqi assaulted by British troops can sue MoD*, THE TIMES (London), June 14, 2007, at 32, available at [www.timesonline.co.uk/tol/news/world/iraq/article1929367.ece](http://www.timesonline.co.uk/tol/news/world/iraq/article1929367.ece).

11. See United Nations S.C. Res. 1483, UN Doc. S/RES/1483 (May 22, 2003), in which the Council expressly recognized “the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command.”

12. Al-Skeini (HL), *supra* note 9.

13. The facts in these first five cases are described in some detail in the first instance judgment of the Divisional Court of the Queen’s Bench Division of the High Court: The Queen (on the application of Al-Skeini and Others) v. Secretary of State for Defence, [2005] 2 W.L.R. 1401, paras. 55–89 [hereinafter Al-Skeini (DC)].

14. *Id.*, paras. 81–89.

15. Human Rights Act, 1998, c. 42 [hereinafter HRA].

16. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 5 [hereinafter ECHR].

17. The Queen (on the application of Al-Skeini and Others) v. Secretary of State for Defence, [2006] 3 W.L.R. 508 [hereinafter Al-Skeini (CA)].

18. ECHR, *supra* note 16, art. 1 (emphasis added).

19. Literally, the “juridical space” of the Convention, i.e., (for the purposes of the present analysis) the geographical area within which the Convention rights can apply.

20. The ECtHR jurisprudence is confusing and contradictory but its two principal approaches to the extraterritorial application of Convention rights by military forces of a State Party are derived from *Loizidou v. Turkey* (Preliminary Objections), Judgment of 23 Mar. 1995, ECHR Series A no. 310 (holding that, as Turkey exercises “effective control” in northern Cyprus, a territory that had formerly had the benefit of Convention rights as part of the Republic of Cyprus, Turkey must apply the Convention in that territory); and *Bankovic and Others v. Belgium and 16 Other Contracting States* [GC], no. 52207/99, ECHR 2001-XII (holding that “effective control” means the exercise of some or all of the public powers of the government, and that as the ECHR is an essentially regional treaty instrument with limited geographical reach, it was not intended to apply throughout the world in States that had never been parties to the Convention, even in respect to conduct by States that were parties thereto). The effect of the decision in *Bankovic*, clearly, was to construe narrowly the “effective control” doctrine elucidated in *Loizidou*. Thus, bombing the Federal Republic of Yugoslavia (FRY) from a height of 30,000 feet was not considered to amount to effective control of the territory for the purposes of extraterritorial application of the ECHR, because the FRY was not within the “*espace juridique*” of the Convention. *Id.*, para. 80.

21. HRA, *supra* note 15, sec. 6(1).

22. The government conceded the point already in the wake of its defeat in respect to Baha Mousa in the Divisional Court. See *Al-Skeini* (CA), *supra* note 17, para. 6.

23. *Supra* note 20.

24. *Id.*

25. Judgment of June 26, 1992, ECHR Series A no. 240.

26. *Al-Skeini* (DC), *supra* note 13, para. 287.

27. Judgment of Nov. 16, 2004, ECHR no. 31821/96.

28. *Al-Skeini* (CA), *supra* note 17, para. 91.

29. *Id.*, para. 96.

30. *Al-Skeini* (HL), *supra* note 9, para. 127.

31. *Id.*, para. 129.

32. *Id.*, para. 132.

33. See Michael Evans, *MoD sued over ‘36 hours of hell’ in Basra*, THE TIMES (London), Nov. 16, 2007, at 25, available at <http://www.timesonline.co.uk/tol/news/world/iraq/article2879821.ece>.

34. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9).

35. See, e.g., Paul Adams, *Army verdict throws up questions*, BBC NEWS, June 7, 2006, <http://news.bbc.co.uk/1/hi/uk/5056944.stm>.

36. See generally *Current Notes, German War Trials – Report of Proceedings before the Supreme Court in Leipzig*, 16 AMERICAN JOURNAL OF INTERNATIONAL LAW 628 (1922).

37. International Criminal Court Act, 2001, c. 17. The Act does not provide for the International Criminal Court (ICC) to have jurisdiction over British servicemen, despite its title. On the contrary, it provides for comprehensive definitions of, and UK criminal court jurisdiction over, the crimes that are contained in the ICC Statute.

38. Army Act, 1955, c. 18.

39. The Queen v. Donald Payne and Others, General Court-Martial, charge sheet available at [www.army.mod.uk/apa/courts\\_martial\\_trials/payne\\_and\\_others/\\_charge\\_sheet.htm](http://www.army.mod.uk/apa/courts_martial_trials/payne_and_others/_charge_sheet.htm).

40. UK soldier jailed over Iraq abuse, BBC NEWS, Apr. 30, 2007, <http://news.bbc.co.uk/1/hi/uk/6609237.stm>.
41. 'Historic' abuse court martial ends, BBC NEWS, Mar. 13, 2007, <http://news.bbc.co.uk/1/hi/uk/6445633.stm>.
42. Duncan Hooper, *Colonel cleared over mistreatment of Iraqis*, TELEGRAPH.CO.UK, Feb. 14, 2007, <http://www.telegraph.co.uk/news/main.jhtml;jsessionid=AXNGII3LURBQXQFIQMGSFFOAVCBQWIV0?xml=/news/2007/02/14nmendonca114.xml>.
43. Stewart Payne & Nigel Bunyan, *Officers attack MoD over 'scapegoat' Mendonca*, TELEGRAPH.CO.UK, June 2, 2007, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/06/02/narmy02.xml>.
44. Rome Statute of the International Criminal Court art. 28(a), July 17, 1998, 2187 U.N.T.S. 90, reprinted in 37 INTERNATIONAL LEGAL MATERIALS 999 (1998).
45. This was the case of *The Queen v. Gary Paul Bartlam* (unreported, General Court-Martial, Jan. 7, 2005). Fusilier Bartlam pleaded guilty to three charges of aiding and abetting another soldier who "placed an unknown male, who was being detained by British Forces and whose hands were tied, on the forks of a forklift truck, raised the forks and drove the forklift truck," and of photographing "two unknown males who were being detained by British Forces and who were being forced to simulate a sexual act." He was given a dishonorable discharge and sentenced to eighteen months in a young offenders' establishment, although this was subsequently reduced by the Army Reviewing Authority to twelve months' military detention.
46. Unreported, General Court-Martial, Feb. 23, 2005.
47. *Supra* note 38.
48. Martin Hickman, *British soldiers who abused Iraqis are jailed and dismissed from the Army*, THE INDEPENDENT, Feb. 26, 2005, <http://news.independent.co.uk/uk/politics/article13012.ece>.
49. Daniel McGrory, *Iraq abuse soldier to be freed after four months*, TIMESONLINE, June 2, 2005, <http://www.timesonline.co.uk/tol/news/world/iraq/article528925.ece>.
50. See UK Parliament, Joint Committee on Human Rights, Session 2005–2006, Nineteenth Report, The UN Convention Against Torture (CAT), May 26, 2006, HL Paper 185-1/HC 701-1, paras. 68–89.
51. See, e.g., Richard Norton-Taylor, *Lawyers take MoD to court over Iraqi mutilation claims*, THE GUARDIAN (London), Oct. 18, 2007, (Top Stories) at 1, available at <http://www.guardian.co.uk/uk/2007/oct/18/iraq.iraq>.
52. United States of America v. Salim Ahmed Hamdan (Decision and Order – Motion to Dismiss for Lack of Jurisdiction), Guantánamo Bay Military Commission, June 4, 2007, available at [www.nimj.com/documents/Hamdan%20Order.pdf](http://www.nimj.com/documents/Hamdan%20Order.pdf); United States of America v. Omar Ahmed Khadr (Order on Jurisdiction), Guantánamo Bay Military Commission, June 4, 2007, available at [www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder\(June%204\).pdf](http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder(June%204).pdf).
53. Hamdan, *supra* note 52, at 3.
54. Khadr, *supra* note 52, at 2.
55. United States of America v. Omar Ahmed Khadr (CMCR 07-001), Sept. 24, 2007, available at [www.defenselink.mil/news/Sep2007/KHADR\\_Decision\(24\\_Sep\\_07\)\(25\\_pages\).pdf](http://www.defenselink.mil/news/Sep2007/KHADR_Decision(24_Sep_07)(25_pages).pdf).
56. Caitlin Price, *Pentagon to move ahead on Khadr trial after court approves jurisdiction*, JURIST, Sept. 25, 2007, <http://jurist.law.pitt.edu/paperchase/2007/09/pentagon-to-move-ahead-on-khadr-trial.php>.
57. Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007).
58. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).
59. Al-Marri, 487 F.3d at 184–90.

60. *Id.* at 186.
61. Public Committee Against Torture in Israel v. Government of Israel, HCJ 769/02, Dec. 13, 2006, available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf).
62. Hamdan, 126 S. Ct. at 2795.
63. *Id.* at 2795–96.
64. *Id.* at 2846 (Thomas, J., dissenting).
65. *Id.*
66. Public Committee Against Torture, *supra* note 61, para. 11.
67. *Id.*, para. 18.
68. *Id.*, para. 21.
69. The latest reissue of the US Army Field Manual on Human Intelligence Collector Operations incorporates reference to Common Article 3 as the benchmark for a single humane standard of treatment for all detainees in military custody, regardless of their status. See Headquarters, Department of the Army, Human Intelligence Collector Operations, FM 2-22.3 (2006), available at <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>. See also Deputy Secretary of Defense, The Department of Defense Detainee Program, DoD Directive 2310.01E (2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf>.
70. *Northern Ireland activates internment law*, BBC NEWS, Aug. 9, 1971, [news.bbc.co.uk/onthisday/hi/dates/stories/august/9/newsid\\_4071000/4071849.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/august/9/newsid_4071000/4071849.stm).
71. See C.P. Walker, *Irish Republican Prisoners – Political Detainees, Prisoners of War or Common Criminals?*, XIX THE IRISH JURIST 189, 189–90 (1984).
72. See UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT paras. 3.1–3.1.3 (2004).
73. For a similar argument developed in much more detail, see the interesting discussion in Geoffrey S. Corn, “*Snipers in the Minaret—What Is the Rule?*” *The Law of War and the Protection of Cultural Property: A Complex Equation*, THE ARMY LAWYER, July 2005, at 28, 31 n.27. Corn argues cogently for a pragmatic characterization of military operations by States against non-State transnational terrorist elements as either “simply ‘armed conflicts’” or transnational armed conflicts, reflecting the global reach of such operations, which trigger application of the basic principles of military necessity and humanity (the latter as reflected in Common Article 3 and Additional Protocol II) as a matter of customary international law. There is much to commend this analysis. In its application of Common Article 3, at least, it uses principles of the law of armed conflict on which there is universal agreement, while simultaneously respecting the peculiar characteristics of such conflicts. Nevertheless, it remains vague as to what specific rules on the conduct of hostilities would be applicable.
74. Article 5 of Geneva Convention III, *supra* note 4, specifies that “[s]hould any doubt arise as to whether persons . . . belong to [the category of POW], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” In my opinion, it is abundantly clear from the continuing controversy over the status and treatment of detainees that doubt has indeed arisen.
75. It is regrettable to conclude on a negative note, but for a contrary view to the one espoused herein, see the comments of John B. Bellinger, Legal Advisor to the US Department of State:

Critics have suggested that the United States is backing away from the Geneva Conventions or ignoring them, and I want to be crystal clear, the United States remains absolutely committed to the Geneva Conventions. We support them, we apply them. But one does have to read what they say. They do not apply to every situation. They in fact apply to conflicts between states. So therefore the Geneva Conventions do not give

you the answers about who can be held in a conflict with a non-state actor. They do not tell you how long you can hold someone in a conflict with a non-state actor. They do not tell you what countries to return people to . . . . The United States is firmly committed to the law that applies. We're also committed to working with other countries around the world to develop new legal norms in cases where existing law does not give one the answers. But what we do think is problematic is to simply suggest that the Geneva Conventions provide all the answers in fighting international terrorism, and that countries simply need to follow the Geneva Conventions and that is the end of the matter.

US Mission to the United Nations in Geneva, Press Conference by the US Delegation to the 30th International Conference of the Red Cross and Red Crescent Movement (Nov. 27, 2007), <http://geneva.usmission.gov/Press2007/1127RedCross.html>.



# **PART V**

## **COALITION OPERATIONS**



# XI

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## Issues Arising from Coalition Operations: An Operational Lawyer's Perspective

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Neil Brown\*

The aim of this article is to illustrate the types of practical legal issues that arise during coalition operations and how they may be managed. These issues are drawn from my experience in relation to operations involving UK forces during the period from October 2002 to February 2005 and, in particular, to the period of combat operations that followed the invasion of Iraq in March 2003. Given that they relate in part to operations that are continuing today, my ability to disclose detail is strictly limited, but I will endeavor to provide practical examples to illustrate points where I can.

### *The Role of the Operational Lawyer*

Among the essential functions of every coalition commander is the requirement, in the planning and execution of a mission, to identify and manage the differing military capabilities across his force. It follows, therefore, that insofar as they might impact on the scope of the military missions, the role of his operational lawyer in the planning and conduct of the mission is to identify, minimize and manage the

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different national legal positions and to ensure that his commander is fully sighted on them. This requires a deep knowledge not only of “his own” national legal position, but also of those of each coalition partner, drawing on whether each has ratified treaties and conventions (and, if so, with what reservations and understandings), as well as an understanding of each State’s practice, *opinio juris* and academic writings.

With the increasingly frequent deployment of forces to multinational peace-keeping and peace-enforcement missions throughout the 1990s, legal differences between even the closest coalition partners, which had remained largely below the radar during decades dominated by Cold War planning, became increasingly visible. By the end of that decade, many lessons had been identified and were the subject of the closest examination from the general, such as our respective positions on the use of lethal force in the defense of property, to the specific, such as “What *could* we have done under *our own* laws if faced with a ‘Srebrenica’?”<sup>1</sup>

The invasion and occupation of Iraq by coalition forces in 2003 threw up a great many “coalition issues” but I will focus on three: first, those arising from targeting; second, those in relation to rules of engagement (ROE); and third, those arising from the capture of internees, detainees and prisoners of war. I will return to the main subjects shortly, but, using a well-known example, let me start by illustrating the sort of complex coalition issues that may arise.

### *Anti-personnel Landmines*

An oft-cited example of coalition differences is the Ottawa Convention on landmines.<sup>2</sup> Put simply, signatories to this Convention may not use anti-personnel landmines in the “victim-initiated mode,” that is, when they may be exploded by the presence, proximity or contact of a person. It does not, however, prevent either the use of other types of landmines, or indeed the use of anti-personnel landmines other than in the “victim-initiated mode.”

While this presents the land component commander of a coalition force comprised of both “Ottawa” and “non-Ottawa” States with a tactical complication, the legal issues extend beyond the “mere” tactical. If a commander, as a result of treaty obligations placed upon him by “Ottawa,” cannot authorize the use of air-dropped anti-personnel landmines to deny an enemy access to a particular facility, he may be faced with the expectation of a higher number of civilian casualties as a result of a kinetic strike. If expected civilian casualties are excessive in relation to the direct and concrete military advantage anticipated, no attack may be possible. Even if not excessive, they may, of course, be greater than those expected if landmines were used instead. There may, therefore, be a tension between treaty obligations. Indeed,

given that prohibitions under “Ottawa” extend to those who would “use, develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly”<sup>3</sup> or who would “assist, encourage, induce anyone else to engage in prohibited activity”<sup>4</sup> differing national positions within a coalition might have wider repercussions and complicate the provision of basing and the management of complex air-tasking order cycles during high-intensity warfighting.

### ***Legal Framework for the Conduct of Operations in Iraq from March to May 2003***

Whatever the precise legal bases adopted by coalition partners for the conduct of operations, and there were subtle differences among the coalition positions, the most important legal question at the operational and tactical levels was of the legal framework to regulate the conduct of the operation. What was clear by early 2003 was that any invasion would precipitate an armed conflict in which the operative law would be the law of armed conflict.

### ***Targeting***

The Gulf War of 1991 generated much legal debate over the extent to which Additional Protocol I (AP I)<sup>5</sup> was said to codify the customary international law on the use of force in armed conflict. This may have been in part because at the time, while most of the members of the coalition against Iraq had ratified AP I, the United Kingdom and Australia had signed but not ratified, and the United States had signed but in 1987 announced that it did not intend to become a party. This, and the fact that Iraq had not even signed it, meant that AP I was therefore not applicable to those hostilities. Between 1991 and 2003 there had been only modest change to the overall position in that the United Kingdom (like Australia) had ratified AP I, whereas the United States and Iraq had not. Nevertheless, in 2003 *as a matter of practice* it is arguable that the definition of a military objective and the principles of distinction and proportionality, even the use of precautions in attack, as they are set out in AP I,<sup>6</sup> were generally applied by all coalition forces. Put simply, if asked whether as a matter of practice AP I differences were significant in the early part of 2003, I would have to say that on the whole they were not.

Among the reasons for this, a number are simply practical. The relatively straightforward application of customary international law as reflected in AP I during the high-intensity warfighting operations in the first half of 2003 was due in part to the scale and character of the operation. Despite its formidable military power, the 2003 invasion force was about half the size of that which had evicted Iraq from Kuwait in 1991. This relatively small force embarked upon a high-speed

land offensive on a single axis aimed at Baghdad. This had three consequences that, taken together, had a significant legal effect. First, by the time of the invasion the warfighting mission was—effectively—an agreed one. Second, the scale and character of the land maneuver had required the governments of coalition forces to delegate the authority to conduct attacks to their commanders in theater. And third, in those first six weeks or so of operations, coalition forces conducted what was, legally speaking, a most conventional international armed conflict.

The proportionality test—as it applies in targeting, and in particular to the center of gravity, which is a determination of the military advantage—is ideally suited to use by military commanders in support of their forces engaged in a conventional land campaign. That is not to say that there will not be differences, but most differences are, in my experience, successfully resolved by staff officers in theater who have an understanding of, and respect for, each others' national positions. This was greatly assisted in 2003 by the presence in deployed headquarters of UK and US officers who were able to draw upon shared experience and mutual confidence that had grown out of operations conducted together since 9/11 in relation to Afghanistan. Finally, and perhaps ironically in light of events which have ensued, it must be accepted that the initial combat operations were successful; so successful that commanders were able to apply a cautious approach without any obvious military penalty, and could have decided not to authorize attacks which, while capable of being conducted lawfully, might have had an adverse information operations impact.

I have until now focused on the issues as they relate to what might be called “deliberate targeting.” This is where the most senior military commanders in theater, supported by technologically sophisticated targeting systems and specialist staffs, including (among others) targeteers, intelligence officers, image analysts, operational analysts and, of course, legal advisers, make command decisions on the legality of airstrikes as part of a huge and sophisticated command process. Such processes are quite capable of delivering kinetic attacks by hundreds of aircraft throughout a campaign. While that process is incredibly accurate and—for its size and complexity—agile, not all air attacks can be subject to the deliberate targeting process however expedited. While the law places the heaviest burden on senior commanders to take the greatest steps to avoid or minimize the effects of an attack on civilians to the extent that it is feasible for them to do so, the reality is that the obligations upon all who plan, authorize and conduct attacks are derived from the same law. Therefore, it is perhaps a dangerous oversimplification to suggest that, except where attacks are approved as a part of a deliberate targeting process, the use of force is solely a matter for ROE.

In order to provide support to land forces engaging the enemy in a city or built-up area, the availability of immediate kinetic support to be applied with the highest possible accuracy is necessary. In 2003, in response to an “urgent operational requirement,” coalition partners acting independently produced strikingly similar direction and guidance that identified the same legal obligations, identified the respective legal responsibilities of those requiring close air support and those directly involved in providing it, and sought to ensure that within what was a tactical-level targeting process all involved were quite clear as to “who owned the bomb” so that legal obligations were discharged. Coalition forces were effectively interoperable in this respect.

### *Rules of Engagement*

Having set out some of the successful features of recent coalition operations and demonstrated their interoperability, I now have to make an admission—in 2003 the coalition partners at all times operated on their own separate targeting directives and their own separate rules of engagement. It is with this in mind that I have been asked to consider the problems that flow from not having coalition ROE. Having trained as an operational lawyer in the years that followed Kosovo, I was keenly aware of the perception that coalition operations are necessarily fraught with difficulties or, in the view of some, that they may be more trouble than they are worth. The difficulties of Kosovo and other coalition operations in the 1990s have clearly had a lasting impact in military legal circles on both sides of the Atlantic and may even be behind the specific question which I have been asked to address.

There is no doubt that in each of our respective nations ROE can mean different things. They can be placed in different parts of mission directives or operational orders. They can be presented in the form of guidance or orders. They can use different language and style. However, as I have sought to suggest here, if the legal basis for the mission and the legal framework for the use of force used by coalition partners are sufficiently coherent, then the use of different ROE doctrine, formatting, style and process is entirely manageable. The key question about national ROE in the coalition context is “What exactly do they *mean*? ”

Too often, operators, and even occasionally military lawyers, have been tempted to label differences in national law or policy as “ROE problems.” Such debate does not begin to identify the problem, only the symptom. If different ROE are rules or guidance (that distinction is not important here) that reflect a common legal authority to conduct a mission then their *effects* will be largely the same.

For more than a decade after the passing of the UN Security Council resolution<sup>7</sup> to enforce the sanctions imposed after the Iraqi invasion of Kuwait maritime commanders enjoyed the use of a mandate that was perhaps unprecedented in its simplicity and robustness, and became accustomed to stopping vessels—indeed “all inward and outward maritime shipping”—in order to ensure strict implementation of the embargo imposed by Security Council Resolution 661.<sup>8</sup> Once established that a vessel was proceeding to or from Iraq (not too arduous a task given the geography of the northern Arabian Gulf) there was no requirement to have either the “suspicion” or “reasonable grounds” as to its precise activity before boarding that are common requirements in peace and (in relation to neutral vessels) in armed conflict.

Post-9/11 maritime operations were not legally so straightforward. Indeed, in the context of maritime security operations, the vexing issue of masters’ consensual boardings illustrates the altogether different legal picture that exists. Among coalition partners, some (including the United Kingdom) do not believe that the master has the authority to permit boardings by foreign authorities under either the 1982 United Nations Convention on the Law of the Sea<sup>9</sup> or the customary law of the sea. Others disagree and take the position that with the voluntary permission of the master not only may the vessel be boarded, but the ship’s papers and cargo may be inspected.<sup>10</sup> While this and other national legal positions may be reduced by operators to a matrix of coalition ROE and a “traffic light” encapsulation of what certain States can and cannot do, this is not a ROE issue. Instead, it is the serious business of sovereign States having different views on the status of international law; views to which they are entitled and views which will not be remedied by simple request to the chain of command to modify the ROE.

The conundrum for military lawyers is to ensure that the status of ROE, and in particular the relationship between ROE and the law, is absolutely clear. This task is difficult enough within national armed forces, but within a coalition it is quite possible that national positions could range from “if the ROE permit me to act my actions are lawful” to “the ROE permit me to act within the law.” The implications of such different approaches are plain—if we are unable to identify the link between ROE and legal authority for them the cohesion of the coalition is at risk.

There has been a crucial debate in academic and military legal circles in recent years on the issue of “direct participation in hostilities.” What does it mean, however, when ROE permit a relatively junior commander to declare unidentified attackers “hostile”? Does it mean that a test for the “direct participation” has been met or is he simply determining that they are a threat against which lethal force may be used in self-defense? If it is the former, the conduct of any attack will be regulated by the law of armed conflict and the operative proportionality rule will likely

be much more permissive than that available under any national laws. If it is the former, in an armed conflict, those captured will have the right to be treated as prisoners of war. These are the legal implications which can flow from the application of ROE at the individual unit level.

A coalition commander must be vested (by his operational lawyer) with a compete understanding of what coalition forces can and cannot do, *and why*. He must know whether he can expect disparities to be remedied by a ROE request for additional authority to act, or whether a States' forces are already at the limits of their national legal positions. Coalition commanders must appreciate whether those national positions are policy positions (which may change) or legal positions (which may be less likely to change). Will a common ROE remedy these perceived problems? My short answer to this is no, but I can quite see how the use of common language and form might greatly assist the process of identifying, minimizing and managing different national positions.

### *Prisoners of War, Detainees and Internees*

Given the almost immediate and widespread legal controversy that surrounded the establishment of the detention facility at the US naval base at Guantanamo Bay, Cuba, the conclusion by the three main coalition partners in March 2003 of a memorandum of understanding (MOU) for the handling and transfer of prisoners of war, internees and detainees in Iraq was a clear indication of the anticipated "conventional" international armed conflict which was to commence with the invasion. The power to capture enemy combatants in Iraq was derived from belligerent powers under the law of armed conflict and the conditions for their treatment were, the partners agreed, set out in the Third Geneva Convention.<sup>11</sup> The resultant MOU was, in great part, similar to that agreed by their predecessors in 1991 and provided, in particular, for the transfer of prisoners between coalition partners.

And so if asked whether there were, during combat operations in 2003, significant coalition problems in relation to the handling of prisoners of war, internees and detainees in Iraq as a result of any different interpretation of the law of armed conflict I would have to say no. Even when the actions of a large proportion of the Iraqi military who abandoned their units and uniforms at an early stage in the war threw up unexpected challenges, the handling of issues was generally successful. This included, for example, the instigation of a novel initial screening system involving joint teams of UK and US military legal and operational officers to process large numbers of prisoners where the delay to conduct Article 5 tribunals<sup>12</sup> in every case was unnecessary.

Whereas the issues relating to prisoner of war camps were relatively straightforward, ongoing operations in Iraq and Afghanistan have presented complex coalition legal challenges. Under Article 78 of the Fourth Geneva Convention occupying powers may intern inhabitants of the occupied territory "for imperative reasons of security."<sup>13</sup> This power has been broadly preserved in the UN Security Council resolutions that have authorized the ongoing presence of multinational forces in Iraq since 2004.<sup>14</sup> Indeed, using this power the United Kingdom has held an average of around 120 internees in the Multi-National Division South East area of responsibility, including one (Mr. Al Jeddah, a UK citizen captured in Iraq) since 2004. The United Kingdom's ability to intern has been the subject of legal challenge in our domestic courts.

Many will be familiar with the position of the United Kingdom in relation to the death penalty, but cases in the UK domestic courts arising out of incidents in Iraq have now established that those captured and held by UK forces on operations outside armed conflict have rights under the European Convention of Human Rights (ECHR).<sup>15</sup> These include not only the right not to be tortured but also a right to liberty. On this basis, the right to intern was challenged and successfully defended. A feature of UK operations since 2003 therefore has been the legal examination of the relationship between international humanitarian law and international human rights law, particularly in relation to when detainees and internees may be handed over and to whom. The United Kingdom cannot transfer internees to States who cannot guarantee that their essential human rights will be upheld. This places demands upon coalition commanders to understand, through their operational legal advisers, the respective legal responsibilities which apply to all those under their operational command. Can we guarantee that if internees are transferred to a coalition partner they will be released when their internment is no longer necessary for imperative reasons of security in Iraq or may they still be held while they are of actual or even potential intelligence value? Concerns about torture and mistreatment may get the headlines, but given the right to liberty present in the ECHR and other similar regimes, the first-order issue for coalition commanders may be to identify exactly what legal authority coalition partners and host nations believe they have to detain and when they consider they are obliged to release.

### *Private Military Contractors*

Although much progress has been made in recent years in addressing the issues discussed above, there is an elephant in the room that will, I believe, require our careful attention, even in the maritime environment. If they have not done so already, coalition planners may in the future have to consider not only international

military forces and interagency forces and international interagency forces, but also the private military contractors who seem determined to expand into roles which may previously have been considered the preserve of the military.

### *Concluding Comments*

I believe that coalition operations can work, and can work well. I witnessed a US-instigated coalition ROE response to a successful suicide vessel-borne improvised explosive device attack on a boarding party in the northern Arabian Gulf that took hours, not days or weeks, to plan and implement. This was possible because the operational legal advisers to the maritime commanders in the region as a matter of course had continually identified, minimized and managed their respective coalition positions. There will continue to be difficulties, but perhaps militaries and military lawyers have begun to understand better how to deal with them. If they have, all military commanders may begin to view the law as it applies across coalitions less as a constraint and more as an enabler.

### *Notes*

1. During the Bosnian war of the 1990s, in response to the ethnic-cleansing campaign of Serb forces in eastern Bosnia, to protect Bosnian civilians who were the victims of the campaign the UN Security Council established a “safe area” in which Srebrenica and the surrounding area were to be free from any armed attack or other hostile act. S.C. Res. 819, U.N. Doc S/RES/819 (Apr. 16, 1993), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/221/90/IMG/N9322190.pdf?OpenElement>. A Dutch contingent of the United Nations Protection Force was detailed to keep the peace at Srebrenica, where large numbers of civilians had taken refuge. By July 1995 the humanitarian situation in Srebrenica was dire. Then on July 9 Serbian forces entered the “safe area” and over the next 10–14 days conducted what became known as the “Srebrenica massacre,” with the number of deaths estimated at eight thousand. A Dutch inquiry into the event concluded that the lightly armed Dutch force passively watched the Serbs separate the men and boys from the women and girls and load them on busses for transport to locations where they were executed. For a detailed discussion of the events at Srebrenica, see Srebrenica massacre, Wikipedia, [http://en.wikipedia.org/wiki/Srebrenica\\_massacre](http://en.wikipedia.org/wiki/Srebrenica_massacre) (last visited Mar. 17, 2008).

2. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211, reprinted in DOCUMENTS ON THE LAWS OF WAR 648 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

3. *Id.*, art. 1.

4. *Id.*

5. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, at 422.

6. *Id.*, arts. 52.2, 57.

7. S.C. Res. 665, U.N. Doc. S/RES/665 (Aug. 25, 1990), *available at* <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/15/IMG/NR057515.pdf?OpenElement>.
8. S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990), *available at* <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/11/IMG/NR057511.pdf?OpenElement>.
9. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3.
10. US Navy, US Marine Corps & US Coast Guard, The Commander's Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A para. 3.11.2.5.2 (2007). For a discussion of the master's authority to consent to boardings, see Sandra Hodgkinson et al., *Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap*, 23 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 583, 591–606 (2007).
11. Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, at 244.
12. *Id.*
13. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, at 301.
14. See, e.g., S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement>.
15. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. For a discussion of the UK domestic court cases, see David Turns, *The Treatment of Detainees and the “Global War on Terror”: Selected Legal Issues*, which is Chapter X in this volume, at 200–207.

# XII

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## Coalition Operations: A Compromise or an Accommodation

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Vicki McConachie\*

*[T]here is no quandary in the mind of Australia's military leaders when we examine where we might need to be technologically; we use interoperability with the United States as a benchmark. However, we must strike a balance that ensures we remain interoperable with both technically advanced allies and those not as technically advanced, but no less important, regional and coalition partners. Australia successfully led the UN effort in East Timor because it had the ability to flex its command and control systems, technology, tactics, techniques and procedures in both directions to accommodate coalition partners across a range of technological capabilities. We must continue to achieve this balance within a tight budget. This will challenge our ingenuity and, I suspect at times, our patience!<sup>1</sup>*

Legal interoperability is, in many ways, similar to technological interoperability; it is required for nations to operate effectively in coalitions. However, legal interoperability is also in many ways more difficult to achieve. While it may be relatively easy to persuade those outside the military of the need for technological interoperability, it is perhaps more difficult to persuade those engaged in international negotiations that military interoperability should take precedence over other goals a nation might wish to achieve in becoming a signatory to

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a proposed international agreement. This means that military planners, with the assistance of their lawyers, must find a practical way to accommodate the various legal needs of their coalition partners while ensuring that operations are not compromised.

In this article I am going to deal with the issues surrounding coalition operations. I will begin with a brief overview followed by a discussion of some of the main constraints, how they are dealt with (both formally and on a practical level) and what opportunities we gain from accommodating the differences of our coalition partners.

Many of the issues surrounding coalition operations are well settled—or at least well-furrowed ground. At the heart of these issues is the fact that coalition members who come together for a common purpose may not be signatories to the same conventions and, even if they are, they may not have a common interpretation of the applicable international law. They may view the nature of the operation as being different in character, one member characterizing the operation as a police action, another as a non-international armed conflict and a third as an international armed conflict. The coalition partners will certainly have varying obligations under their domestic laws and may have quite different domestic political imperatives leading to differing policy guidance. All of this must be accommodated to achieve a successful mission outcome. It is important to note that if you lose public support for operations then political resolve may be undermined, leading to disintegration of a coalition.

On occasion a coalition partner may wish that these differences would have a simple resolution. What must be remembered, however, is that these are coalitions. A coalition is not a group of client States acting subject to a patron's desires. The coalition has come together, usually pursuant to a UN Security Council resolution, and it is composed of sovereign States who have chosen for various reasons to act together to pursue interests that may be different, but which will be served by their presence in the coalition and the actions that they take while members of that coalition. As noted by Rear Admiral Raydon Gates, Royal Australian Navy:

In coalitions, compatible national interests are and certainly must be present, but compatible interests are not necessarily common interests. . . . [I]t follows that within the coalition force we immediately have the potential for a number of different military objectives, reflecting differing national political objectives.<sup>2</sup>

Nonetheless a coalition partner may feel that, because of its greater commitment in terms of manpower and economic contribution and its ostensible responsibility for the success or otherwise of the mission, it should prevail where there are

differences of opinion. However, this is not the international reality. Rather the reality is that all States must reach an accommodation that satisfies their national obligations and interests.

So does this accommodation lead to a compromise of mission or values for the State actors? While you could characterize this accommodation as representing the lowest common denominator,<sup>3</sup> that would be quite wrong. In fact, the accommodations should rather be taken as encouraging the partners to look critically at their rules of engagement and to carefully consider the impact they have on coalition cohesion. It is the accommodation of difference that is the essence of equality<sup>4</sup> in a coalition of sovereign States.

### *Key Constraints*

There are several areas of difference that have affected coalition operations or given rise to concern between coalition partners over the last decade. These areas include

- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I);<sup>5</sup>
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention);<sup>6</sup>
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights);<sup>7</sup>
- National law, including the criminalization of behavior on the battlefield;
- Rome Statute of the International Criminal Court;<sup>8</sup> and
- National policy.

### **Protocol I**

A key area of concern in relation to coalition operations has been identified as Protocol I. While many nations who have engaged in coalition activities with the United States are parties to Protocol I, the United States has not ratified the Protocol. This difference in international obligations of itself creates an issue that must be reconciled when planning coalition operations.

In planning operations regard may be given to statements by the United States that it follows the principles underlying Protocol I as part of customary law.<sup>9</sup> Ostensibly this adds clarity to the obligations that the United States considers binding on itself. However, the matter is complicated by lack of certainty as to the US position in relation to which underlying principles of Protocol I form part of customary

international law. In particular, before September 11, 2001 there seemed to be a degree of certainty as to those parts of Protocol I the United States viewed as not forming part of customary law. This included such matters as

- Its applicability to “wars of national liberation”;
- The prohibition on use of enemy emblems and uniforms during military operations;
- The prohibition on causing widespread, long-term and severe damage to the environment;
- The definition of combatant;
- The prohibition on the use of mercenaries;
- The prohibition on reprisals;
- The definition of military objective; and
- The protection of dams and dykes.<sup>10</sup>

Since September 11, 2001, however, there is less certainty as to which provisions the United States views as binding on it as embodying customary international law. In his article “England Does Not Love Coalitions’ – Does Anything Change?,” Charles Garraway says:

It is interesting in reading the so-called “Torture Memos,” to find the almost complete lack of reference to Additional Protocol I. It is as if it has been wiped out of the memory bank. It is no longer even clear whether the United States accepts such key provisions as Article 75 on Fundamental Guarantees. . . . This lack of legal clarity causes acute problems for Allies seeking to work alongside the United States.<sup>11</sup>

Both the difference in formal legal obligations occasioned by some coalition partners’ being signatory to Protocol I while others are not and the uncertainty as to what parts of Protocol I the United States considers as forming part of customary international law are factors that must be considered in planning for coalition operations.

### Ottawa Convention

The Ottawa Convention on anti-personnel mines is another point of difference between the United States and many of its coalition partners. While the United States is not a party to the Ottawa Convention, nations such as Australia, the United Kingdom, Denmark, Japan and the Netherlands, among many others, are parties.

Clearly obligations under the Convention must be considered when examining the contribution a coalition partner may make. In particular, State parties to the Convention undertake

never under any circumstances:

- (a) To use anti-personnel mines;
- (b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;
- (c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

2. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.<sup>12</sup>

In practical terms for coalition operations, the greatest constraint of the Ottawa Convention is the prohibition on assisting, encouraging and inducing activity that is prohibited under the Convention. This may include such conduct as transporting personnel who have anti-personnel mines in their possession, or refueling aircraft or ships carrying anti-personnel mines.

### **The European Convention on Human Rights**

Likewise the European Convention on Human Rights can impact upon a member's ability to undertake certain operations. For example, the European Convention influenced British reluctance to use lethal force to defend property in Iraq and also underpinned its lack of support for the use of the death penalty by Iraqi courts during the occupation period.<sup>13</sup>

### **Domestic Law**

Beyond a nation's international obligations is its domestic law. The actions that a nation is prepared to take in a particular conflict or peacekeeping situation are not merely an expression of a nation's international obligations. They also reflect domestic law and policy considerations. These matters concerning domestic law are not always apparent to coalition partners and unless discussed can be a source of uncertainty.

The uncertainty can be heightened by complicating factors such as how the particular coalition partner views the character of the operation. The impact of domestic law may vary depending on whether the operation is characterized as international armed conflict, non-international armed conflict or policing.

An example of the impact of domestic law on operations is given by Captain M.H. McDougall, in her article “Coalition Operations and the Law.”<sup>14</sup> In examining the issues surrounding the transfer of detainees between coalition partners, she notes that issues of domestic law require consideration—in particular, Section 7 of the Canadian Charter of Rights and Freedoms, which may prohibit the transfer of detainees to coalition partners where they may be potentially subject to the death penalty.<sup>15</sup>

### Criminal Offenses

Another influence on interoperability is the criminalization of behavior on the battlefield. For example, Australia, as a party to the Rome Statute, has introduced into domestic law a number of offenses to reflect its obligations.<sup>16</sup> These, of course, have extraterritorial application.

Beyond the offenses introduced as a result of the Rome Statute, there is a continuing trend in Australia to make criminal offenses and regulatory regimes<sup>17</sup> extraterritorial in their jurisdiction. For example, the Criminal Code Act 1995 makes it an offense in certain circumstances to cause the death of an Australian citizen or resident overseas.<sup>18</sup> While the defense of lawful authority<sup>19</sup> is likely to apply, there remains a risk that Australian personnel may be charged when an Australian citizen or resident is killed during operations.

This increase in offenses with extraterritorial jurisdiction means that commanders must increasingly consider whether operations potentially give rise to an offense being committed by themselves or their personnel. These offenses could be criminal in nature or aimed at such matters as environmental protection and occupational health and safety.

### Damages

Apart from the criminal law, commanders are increasingly concerned about their possible responsibility for civil law claims arising from operations. Indeed in March 2008, an Iraqi family commenced an action for damages in the Queensland Supreme Court in Australia as a result of an incident in Baghdad in early 2005. The family, who was brought to Australia by the Australian government for medical treatment, alleges that it was fired upon without warning. While in this instance the family is suing the Australian government,<sup>20</sup> the case raises questions about the personal liability of soldiers who harm civilians during operations.<sup>21</sup>

### National Policy

Beyond the law, however, is national policy. This should not be discounted because it is essentially the expression of the democratic will. There will always be matters

that—while lawful—are unpalatable and government direction to the military will be given to express the will of the people. National policy may or may not be visible to coalition partners and therefore may add further ambiguity to the coalition relationship.

### ***How Do We Deal with the Constraints?***

All of these matters—uncertainty over the US view of the principles underlying Protocol I, the Ottawa Convention, the characterization of an operation, domestic law and policy—may contribute to uncertainty as to what action a coalition partner may take. While this lack of legal clarity is a matter that must be addressed in the planning of and participation in coalition operations, it is not fatal to effective coalition partnerships. The evidence of this is the fact that coalition operations have taken place in a number of theaters since September 11, 2001. In spite of the differences, effective legal interoperability is very common.<sup>22</sup> Accommodation of differences is made to facilitate operations.

The question then is what are the mechanisms that allow this to be achieved? Captain Dale Stephens, Royal Australian Navy, notes that legal interoperability has been achieved through a number of means, namely, by reservations or declarations to treaties and extensive consultation and sharing of military law manuals, as well as a psychological will to coalition mission accomplishment and the development of multilateral rules of engagement for operations.<sup>23</sup>

### **Declarations**

At the formal level, one mechanism used by nations to manage their varying treaty obligations is that of declarations.

#### *Protocol I*

In relation to Protocol I, declarations have been used to clarify coalition partners' obligations. For example, Australia has made a declaration that includes clarification as to the Australian understanding regarding the definition of "military advantage."<sup>24</sup> The effect of this declaration is that, while Australia is a party to Protocol I and the United States is not, it is still possible that the approaches of the two countries to issues such as targeting can be harmonized. However, while declarations have made it easier to manage conflicting approaches between the United States and Australia, it is clear that there are still differences—albeit the precise nature of these differences has been made more difficult to discern in relation to Protocol I in the post-September 11, 2001 environment.

### *Ottawa Convention*

In relation to the Ottawa Convention, Australia has again used a declaration of understanding. Among other matters, this declaration clarifies that operating with the armed forces of States which are not party to the Convention and that engage in activity prohibited under the Convention is not, by itself, a violation of the Convention.<sup>25</sup> The effect of the declaration is that Australia can act with States that are not party to the Convention in a coalition, provided that Australia does not assist, encourage or induce those parties to act contrary to the Convention. Thus, to ensure compliance, a party to the Ottawa Convention must be mindful in operational planning of what support is requested by the forces of a State that is not a party to the Convention and which possesses anti-personnel mines.

### **Domestic Law and Policy**

Rules of engagement for members of a coalition can be different as a result of each partner's own domestic laws and policy.<sup>26</sup> In the area of domestic law and policy we must be mindful of our coalition partners' obligations to comply with their domestic laws. To ask them to do otherwise would be to undermine the rule of law and to fail to respect their sovereignty. As Charles Garraway said, to demand allies act outside the law that binds them "would make a mockery of the rule of law."<sup>27</sup> What we can do is to use open dialogue to better understand and accommodate issues of difference and respect our coalition partners when they decline a mission because of domestic considerations.

### **General**

All of these differences may be encapsulated in coalition partners' rules of engagement. As Captain Dale Stephens said in his article "Coalition Warfare: Challenges and Opportunities," however, effective interoperability "[i]n the modern context of 'coalitions of the willing' ... means achieving a harmonization of rules of engagement ...."<sup>28</sup>

To achieve interoperability at the working officer level requires critical examination of where the common approach may lie—although it should be noted that it is difficult to frame rules of engagement in circumstances where government policy as to the existing law is either unarticulated or has been the subject of changes. So how are these accommodations made at a practical level?

### *Practical Examples of Accommodation of Difference*

#### **Timor Leste**

There are a number of practical examples of the accommodation of difference promoting effective coalition operations. An example of such a challenge, which has

received previous examination by Colonel Mike Kelly in his article “Legal Factors in Military Planning for Coalition Warfare and Military Interoperability,”<sup>29</sup> is operations in Timor Leste in 1999. As leader of the International Force East Timor mission, Australia was in the position of needing to forge a coalition to conduct stabilization and pacification operations in Timor Leste following militia violence that broke out after the vote for independence. Australian planners confronted the issue of aligning mission rules of engagement to accommodate all of the participating coalition States.

In this operation the mission rules of engagement formed the basis for operations. These rules of engagement were more expansive than some participating nation’s own rules of engagement. The more expansive aspects of the mission rules of engagement included provision for the use of up to and including lethal force to protect specifically designated property considered essential to the success of the mission.<sup>30</sup>

This protection of mission-essential property was one of the more contentious aspects of the rules of engagement. A key issue was that the United Kingdom, New Zealand and Canada viewed this as only being acceptable where a direct association with the protection of life could be established.<sup>31</sup> Some Australian uniformed lawyers took an expansive view of the use of lethal force to protect property.<sup>32</sup> However, in a non-armed conflict, it is unlikely that Australian domestic law would permit the use of lethal force to protect property alone. Arguably property on which human life is dependent could be protected by the use of lethal force. Ultimately mission assignment had to accommodate this difference in views on the protection of property.

Likewise in the subsequent UN mission in Timor Leste, UN rules of engagement were issued. This highlighted the differences between UN rules of engagement and national rules of engagement. These differences presented a challenge that required a strategy to accommodate them. Coalition partners were canvassed as to their rules of engagement compliance. As expected, some coalition partners’ national rules of engagement were more restrictive than the UN rules of engagement and they were restricted by their rules of engagement from undertaking certain tasks.<sup>33</sup> In planning particular operations account was taken of this and ultimately the mission was not detrimentally affected by this approach. In the end, differences must be accommodated for a coalition to function effectively, thus ensuring appropriate recognition of the equality of States participating in a coalition.

## **Targeting**

While not the only area of difference, a clear area where legal differences arise on operations is targeting. This is also an area where accommodation has been made

on a number of occasions. The first time that the issue of legal planning factors impacting on interoperability was significant was in Operation Allied Force in 1999 in Kosovo.<sup>34</sup> According to Colonel Kelly:

The United States conducted some 80 per cent of the air strikes against the Serbs and the Americans increasingly chafed at the legal restrictions that other members considered applicable under Protocol I. The situation was compounded by the fact that NATO had no mechanism designed to enforce common legal standards.

As a result, NATO policy permitted member states to refuse bombing assignments if they regarded a particular target as being illegitimate. . . . In practice, however, most of the Serbian targets that were rejected . . . were subsequently attacked by the Americans.<sup>35</sup>

This policy by the United States led to friction in the coalition and ultimately to an understanding that when you are trying to maintain cohesion in a coalition it is essential that the obligations and limitations of each member nation are well understood.<sup>36</sup> To fail to understand and ultimately to respect and accommodate the restrictions that other nations place upon themselves in coalition operations is to risk the coalition. As Dale Stephens stated in his article “Coalition Warfare: Challenges and Opportunities”:

Just because the United States retains the full legal capacity to attack the types of objects prohibited by the Protocol to others does not mean that it will necessarily undertake such attacks. Policy imperatives regarding coalition cohesion plainly inform decisions concerning attack profiles.<sup>37</sup>

### Iraq 2003

An example of restraint arose in Iraq in 2003. By the time of the operations in Iraq, there was a greater understanding of the need to accommodate coalition sensitivities. This operation represented the first time for Australia that aircraft would deliver ordnance under the changed legal environment generated by the 1977 Protocol I.<sup>38</sup> Again referring to Colonel Kelly’s examination of coalition operations, “The American targeting system was shaped by precautions that related to the lawfulness of striking individual targets and by a general need to minimise casualties and damage to vital installations.”<sup>39</sup>

Targeting in this operation involved a tiered system based on levels of authority required for approvals related, among other factors, to the anticipated number of civilian casualties and collateral damage.<sup>40</sup> While Australia used this system, the considerations for Australia took account of differences between itself and those

coalition partners not party to Protocol I. In targeting decision-making Australia operated according to national rules of engagement.

To assist Australian commanders planning operations to understand the legal obligations of other coalition partners, two matrices were developed—one for law of armed conflict and one for rules of engagement, noting that the rules of engagement were more prone to change. The law of armed conflict matrix, for example, listed issues such as anti-personnel mines and definition of combatant against each coalition partner and the known international obligations of each. The rules of engagement matrix followed a similar form and greatly assisted in reducing the areas of apparent difference highlighted by the law of armed conflict matrix.<sup>41</sup>

Where there were differences, they were accommodated by the “Red Card” system which allowed a mission to be declined.<sup>42</sup> Even in circumstances where a mission was allocated and agreed, Australian pilots undertaking that mission were given the ultimate discretion not to strike a target which they assessed as not being a lawful target. This ultimate “Red Card” discretion was used and supported by senior Australian personnel.

### **Ottawa**

As previously mentioned, in practical terms for coalition operations the greatest constraint of the Ottawa Convention has been the prohibition on assisting, encouraging and inducing activity that is prohibited under the Convention. This prohibition meant that air-refueling aircraft in Iraq in 2003 were ordered not to refuel any US airframe that was fitted with air-delivered anti-personnel mines, such as the scatterable, mixed-munitions GATORS system.<sup>43</sup> Clearly the operation of such a prohibition would need to be carefully considered and may not be absolute in all circumstances. An exception to the rule may be where the safety of the coalition aircraft needing to be refueled is at risk.

Another practical example of an accommodation to ensure compliance with the Ottawa Convention while supporting coalition operations with a non-party was the transport by coalition partners of US personnel. To ensure compliance, commanding officers of ships transporting US personnel took measures to satisfy themselves that those personnel were not carrying anti-personnel land mines. Provided this condition was met, personnel could be transported.

### **Opportunities**

While these practical examples may seem to be constraining operations, they indicate an accommodation of the restrictions that coalition partners may have during operations. This accommodation of difference also leads to a greater

contemplation of the value of any target or objective as against its cost to the overall coalition operation.

It would be wrong, however, to think that coalition operations are necessarily limiting. As Rear Admiral Gates said:

I would not want to leave you with the impression that political divergence always offers problems, in fact it often offers opportunities. It may be possible for a coalition commander to use the forces of another nation to undertake a task with more freedom of maneuver than would be available to their own forces. For example, I experienced this in the Red Sea in 1992/93 where Australian ROE give our units greater freedom of action, in certain areas, when conducting maritime interception operations with coalition partners. This was an advantage to the US commander, who subsequently employed RAN units closest to the Straits of Tiran at the mouth of the Gulf of Aqaba to intercept “inspection runners” when required.<sup>44</sup>

In employing these innovative solutions, commanders have, of course, to be mindful of their individual legal responsibility for actions that they have been directed to take.

This accommodation of the differing obligations of coalition member States, like technical interoperability, forces an assessment of how best a State can contribute to coalition operations. Rather than asking what a State cannot do, the question is what it can do; where can it make the best contribution to the coalition and what does it need to achieve mission accomplishment within the restrictions placed upon it? Ultimately, making these accommodations, whether they seem to be restrictive or empowering, reinforces the equality of sovereign States necessary in an effective coalition partnership.

### ***Conclusion***

Legal interoperability in coalition planning and operations, like technical interoperability, is essential for mission achievement. As with technical interoperability, while we can aim for the perfect solution, diverging national interests will mean that there will continue to be differences among coalition partners that must be accommodated to ensure effective operations.

This accommodation should not be viewed as being detrimental; rather it has a positive effect on the conduct of operations. The process of dealing with differing coalition views on the applicable law and policy generates a greater level of self-awareness and critical examination that improves the way we conduct operations and aids adherence to the norms of international law. By and large it is important to people who are in the military of a democratic State that they act honorably. It is

also critically important for the maintenance of public support of the operation that they be seen to act honorably. To fail to understand and ultimately respect the constraints that other nations place upon themselves in coalition operations is to fail to treat them as equal coalition partners and to risk profoundly the efficacy of the very coalition.

### **Notes**

1. Raydon Gates, *Toward 2015, Challenges for a Medium Navy: An Australian Perspective*, in THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE 259, 263 (Anthony M. Helm ed., 2006) (Vol. 82, US Naval War College International Law Studies).
2. *Id.* at 260.
3. Michael Kelly, *Legal Factors in Military Planning for Coalition Warfare and Military Interoperability: Some Implications for the Australian Defence Force*, AUSTRALIAN ARMY JOURNAL, Autumn 2005, at 161, 168.
4. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 192 (1995).
5. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
6. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 INTERNATIONAL LEGAL MATERIALS 1507, reprinted in *id.* at 648 [hereinafter Ottawa Convention].
7. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 5.
8. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.
9. Charles Dunlap, *Legal Issues in Coalition Warfare: A US Perspective*, in THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE, *supra* note 1, at 221, 223.
10. Kelly, *supra* note 3, at 167.
11. Charles Garraway, “England Does Not Love Coalitions” – Does Anything Change?, in THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE, *supra* note 1, at 233, 238.
12. Ottawa Convention, *supra* note 6, art. 1.
13. Kelly, *supra* note 3, at 166.
14. M.H. MacDougall, *Coalition Operations and the Law*, in ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS 195 (Richard B. Jaques ed., 2006) (Vol. 80, US Naval War College International Law Studies).
15. *Id.* at 201–202.
16. Criminal Code Act, 1995 (Austl).
17. See, e.g., Section 5 of Environment Protection and Biodiversity Conservation Act 1999 (Cth), which applies the provisions of the Act to Australian citizens and residents outside Australia.
18. Sec. 115.1 Murder of an Australian citizen or a resident of Australia
  - (1) A person is guilty of an offence if:
    - (a) the person engages in conduct outside Australia; and
    - (b) the conduct causes the death of another person; and

- (c) the other person is an Australian citizen or a resident of Australia; and
- (d) the first-mentioned person intends to cause, or is reckless as to causing, the death of the Australian citizen or resident of Australia or any other person by the conduct.

Penalty: Imprisonment for life.

- (2) Absolute liability applies to paragraph (1)(c).

### Sec. 115.2 Manslaughter of an Australian citizen or a resident of Australia

- (1) A person is guilty of an offence if:

- (a) the person engages in conduct outside Australia; and
- (b) the conduct causes the death of another person; and
- (c) the other person is an Australian citizen or a resident of Australia; and
- (d) the first-mentioned person intends that the conduct will cause serious harm, or is reckless as to a risk that the conduct will cause serious harm, to the Australian citizen or resident of Australia or any other person.

Penalty: Imprisonment for 25 years.

Criminal Code Act, *supra* note 16.

19. "A person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law." *Id.*, sec. 10.5.

20. If individual military members were to be named as respondents to a damages action, the Commonwealth of Australia may have vicarious liability for their actions.

21. Rory Callinan, *Counting the Cost*, TIME.COM, Mar. 5, 2008, <http://www.time.com/time/world/article/0,8599,1719622,00.html>.

22. Dale G. Stephens, *Coalition Warfare: Challenges and Opportunities*, in THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE, *supra* note 1, at 245, 247.

23. *Id.*

24. In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that references to the "military advantage" are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack and that the term "military advantage" involves a variety of considerations including the security of attacking forces. It is further the understanding of Australia that the term "concrete and direct military advantage anticipated," used in Articles 51 and 57, means a *bona fide* expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved. It is the understanding of Australia that the first sentence of paragraph 2 of Article 52 is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective.

Available at [http://www.austlii.edu.au/other/dfat/treaties/1991/29.html](http://www.austlii.edu.au/au/other/dfat/treaties/1991/29.html).

25. Text of declaration available at <http://www.austlii.edu.au/au/other/dfat/treaties/1999/3.html>.

26. Dunlap, *supra* note 9, at 224.

27. Garraway, *supra* note 11, at 235.

28. Stephens, *supra* note 22, at 245.

29. Kelly, *supra* note 3, at 161.

30. *Id.* at 164.

31. *Id.*

32. *Id.*
33. Comments to author by Captain Dale G. Stephens, RAN.
34. Kelly, *supra* note 3, at 162.
35. *Id.* at 163.
36. *Id.*
37. Stephens, *supra* note 22, at 250.
38. Kelly, *supra* note 3, at 164.
39. *Id.* at 165.
40. *Id.*
41. Statement to author by Wing Commander Ian Henderson.
42. Kelly, *supra* note 3, at 165.
43. *Id.*
44. Gates, *supra* note 1, at 260.



# XIII

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## Coalition Operations: A Canadian Perspective

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Kenneth W. Watkin\*

In order to put my thoughts in context, I begin by outlining recent Canadian participation in the international sphere. I want to highlight that Canadian Forces operations are not limited to “peacekeeping” as is often misunderstood, not only on the international scene, but also sometimes at home. While Canada chose not to be involved in the 2003 Iraq operation, it has been a fully committed member—in terms both of the lives of its soldiers, sailors and airmen, including women, as well as of “national treasure”—in the coalition and international efforts related to what the United States, our close neighbor to the south, has termed the “Global War on Terror” or the “GWOT,” and what we call the “Campaign Against Terrorism” or the “CAT.”<sup>1</sup> I suppose this subtle use of different terminology is part of the reason this volume contains two other articles<sup>2</sup> authored by representatives of nations that have participated in coalition operations with the United States. Together they illustrate the differing national approaches and understandings relating to participation in a common enterprise.

Regardless of how the conflict is termed, countering Al Qaeda requires a multidisciplinary and multifaceted approach involving civilian and military intelligence agencies, policing, diplomacy and international engagement, as well as the

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use of military forces. The use of military forces encompasses both domestic and international operations. In this regard it should be noted that Canada does not have the equivalent of the US Posse Comitatus Act.<sup>3</sup> Canadian military forces—naval, land and air—can be deployed to provide a wide variety of assistance to law enforcement operations, both within Canada and off our shores.<sup>4</sup>

There has been significant debate about how to characterize the conflicts against non-State actors, such as Al Qaeda, other terrorist groups and insurgent forces. This includes categorizing such conflicts as being “not of an international character,”<sup>5</sup> “international armed conflicts”<sup>6</sup> and “internationalized internal armed conflicts.” From time to time the term “transnational” armed conflict has even crept into academic literature.<sup>7</sup> The Canadian approach has been that at a minimum Common Article 3 of the 1949 Geneva Conventions<sup>8</sup> applies to operations in Afghanistan. Canada, however, has avoided categorizing the transnational operations of Al Qaeda, preferring to simply acknowledge that an “armed conflict” is in existence to which humanitarian law applies regardless of whether operations occur on land, in the air or on the high seas.<sup>9</sup> Remember, however, that the famous *Caroline* case outlining the basis for self-defense for States under international law involved the transborder activities of a non-State actor against Canada.<sup>10</sup>

Of course “war” is such an emotive term, particularly for international lawyers who may have viewed the creation of the United Nations Charter as an end of “war” in any legal sense. In factual terms, “war” very much continues to exist and the conduct of “warfare” is what engages professional military forces, international humanitarian law treaties and customary international law. As has been noted by one Canadian academic institute, 95 percent of contemporary conflicts are “internal” to States.<sup>11</sup> As warfare changes from the industrial age to the information age and perhaps fourth-generation warfare, contemporary military operations have, as the British General Sir Rupert Smith has noted, become the conduct of “war amongst the people.”<sup>12</sup> This trend away from the traditional idea of warfare being “international armed conflict” between nation-States is presenting significant challenges not only for us as military law practitioners, but also for our academic colleagues and for essential stakeholders such as the International Committee of the Red Cross (ICRC) and committed human rights non-governmental organizations. It may be fair to say that the effort in the post–World War II era to restrict the recourse to war by States (*jus ad bellum*) means the rich body of conventional and customary law (*jus in bello*) technically applies to its fullest extent to a significantly decreasing type of conflict. I know the ICRC’s 2005 *Customary International Humanitarian Law* study<sup>13</sup> has garnered criticism from a variety of sources regarding its methodology and some of its conclusions.<sup>14</sup> Indeed, there are parts of the study with which I disagree;<sup>15</sup> however, it remains a significant and, in many ways, a

courageous undertaking at an essential time as operations appear to shift from a focus on international armed conflict to counterinsurgency. I keep a copy of the study close to my desk and it is used regularly by Canadian Forces legal officers as an important resource tool.

Since October 24, 2001 when Canada acted “in the exercise of the inherent right of individual and collective self defence in accordance with Article 51” of the United Nations Charter in response to the armed attacks on the United States, Canada has been a steadfast participant in conducting military operations against the threats posed by Al Qaeda and the Taliban.<sup>16</sup> With our joint enterprise in the North American Aerospace Defense Command, Canada and the United States have worked in an integrated fashion to protect the skies over North America.

Canadian participation has seen the deployment of a significant portion of our navy to the US Central Command’s maritime area of responsibility, including as part of US Navy carrier strike groups and maritime patrol aircraft operations in the Persian Gulf. We have also provided tactical airlift, infantry, special forces and other units to coalition and International Security Assistance Force operations since the beginning of operations in Afghanistan, including the participation of an infantry battle group in Operation Anaconda in 2002. Canada presently has approximately 2,300 personnel operating in Regional Command (South) centered on Kandahar. These include an infantry battle group, combat engineers, artillery, Leopard tanks, armored reconnaissance, an unmanned aerial vehicle unit and operational mentor liaison teams working with the Afghanistan army. A Canadian legal officer was deployed to work with our American colleagues in the Combined Security Transition Command–Afghanistan mentoring program in respect to the Afghan justice system. Further, another legal officer will deploy shortly to the Canadian Operational Mentoring Liaison Team mentoring the Afghan 205 Corps.

The cost of the mission has been high from a Canadian perspective. Fifty-seven personnel, including our first female combat casualty (an artillery officer), have been killed mostly in the last eighteen months. In addition, a Canadian Foreign Affairs officer was killed by an improvised explosive device. Over two hundred personnel have been wounded. As can be expected, the involvement of Canadian Forces personnel in Afghanistan has caused considerable political and national debate. For example, the vote in Parliament in May 2006 to extend the mission in Afghanistan until February 2009 was 149 to 145 in favor of the extension.<sup>17</sup>

The operations in Afghanistan reflect a larger challenge facing all our nations, that being the changing nature of warfare. The challenges presented by “counterinsurgency” warfare include, *inter alia*, the treatment of detainees, the application of human rights norms, and targeting and resulting limitations on collateral damage.

Historically, there are two legal issues that present themselves as “centers of gravity” impacting on the ability of democracies to wage military campaigns against insurgent forces. They are the issue of the treatment of detainees—and, more specifically, the question of torture—and excessive injury and death to civilians (collateral damage). The present campaign is no exception.

As an officer serving for a country that has signed Additional Protocol I (AP I),<sup>18</sup> you might expect that I would indicate that treaty is a reason for differing approaches to the conduct of coalition operations with non-party countries such as the United States; however, it is hard to make that case. Some 85 percent of the world’s States have signed and ratified AP I and many of its provisions are accepted as either customary international law or as a doctrinal basis for the conduct of operations. In other words, a general acceptance of AP I provisions is a matter of “fact.” The AP I provisions are integrated into the training and doctrine of Canadian Forces personnel and their involvement in non-AP I conflicts is not likely to fundamentally change the way wars are fought. That is likely the case of other NATO countries who are AP I countries. The most obvious example of this is the widespread acceptance of the AP I, Article 57 precautionary measures and the principle of “proportionality” in respect to targeting.

There are different legal obligations and interpretations of the law for Canadian personnel than for American forces. An example is the 1997 Ottawa Convention on anti-personnel mines.<sup>19</sup> That Convention clearly prohibits the use, development, production, stockpiling, retention or transfer of anti-personnel mines, as well as assisting, encouraging or inducing such activities. Canadian Forces personnel have specific direction setting out their obligations when they operate with nations who are not parties to the Convention. We may not use anti-personnel mines and cannot request, directly or indirectly, the protection of those mines. However, Canadian Forces personnel can participate in combined operations with non-Convention States. There appear to have been no stumbling blocks, likely because of a general lack of use of such mines in contemporary operations; the relatively large number of countries, including within NATO, who have ratified the Convention; and the general awareness by our personnel of their obligations.<sup>20</sup>

It is simply a fact of coalition operations that nations will often take different approaches to interpreting the law. For example, my experience has been that European nations are more directly impacted by the human rights framework associated with decisions of the European Court of Human Rights than non-European countries, such as Canada and the United States. Further, from time to time we must deal with the different way that civil-law-trained and common law lawyers look at a problem. Again, my experience has been that civil law lawyers will usually approach a problem first from the context of the treaty law provisions, while common

law lawyers read “black letter” law in the context of case law and customary international law. Although the approach can be different, we often end up at the same place.

There can also be differences with countries with similar legal systems, although not as many differences as may be the perceived wisdom. For example, the US interpretation of “military objective,” to the extent that it includes an enemy’s “war sustaining capability,” is broader than that of most States, including Canada. However, it should also be noted that Canada entered a reservation to Additional Protocol I that states, “[T]he military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack.” From a Canadian perspective, targets would not be limited to military forces and could include strategic targets such as rail yards, electric power grids, oil refineries, lines of communication, bridges and supply routes. To the extent, however, that the US wording would include attacks on exports that may be the source of financial resources for a belligerent, it could very well present, as Professor Dinstein has noted, “a slippery slope” in which every economic activity might be considered as indirectly sustaining the war effort.<sup>21</sup> It is likely in this context during a traditional international armed conflict that Canadian and American approaches would differ.<sup>22</sup>

A greater challenge in contemporary operations is determining the role and desired effect of the strategic use of airpower. Comparing the 1991 Gulf conflict and the 2003 Iraq invasion, it would appear that a purely “strategic” approach had curried less favor in the overall planning of the latter campaign.<sup>23</sup> It is a more significant issue when one considers how strategic strikes would realistically impact on a non-State-actor enemy. A problem with the application of strategic airpower is that in practice it appears not to have lived up to the hopes of its most ardent proponents. It is even less likely to have a significant impact during “small wars.”

As is noted by James Corum and Wray Johnson, the most effective use of airpower in opposing insurgents and terrorists conducting a low-level guerrilla war is the use of “indirect” means such as reconnaissance and transport.<sup>24</sup> Issues related to bombing—even with a tactical focus—can raise more profound and challenging questions:

In much of the world, terrorism is seen as the unique weapon of the poor and fanatic; airpower is seen as the symbolic weapon of the West—the means by which the wealthy and advanced countries can bully the poor and weak countries. Thus, bombing is automatically viewed in the Third World as cruel and heavy-handed. This creates a paradox that policymakers today do not seem willing to address. While airpower is often the most effective means to strike at insurgents and terrorists, its use will immediately provoke outcry and protest in many quarters of Western society and throughout most of the Third World. In short, there is a political price to pay.<sup>25</sup>

As Corum and Johnson state, “Bombing civilians, or targeting insurgents and terrorists in urban areas with resulting civilian casualties, generally works to the propaganda advantage of the rebels.”<sup>26</sup>

The issue of “collateral damage” is as important in Afghanistan as it is in Iraq. The Afghan government has increasingly expressed concern over both civilian deaths and the manner in which searches are conducted.<sup>27</sup> NATO itself has recognized the issue of collateral damage as one of the most important ones it faces<sup>28</sup> and *Jane’s* has recently concluded that continued civilian casualties will increasingly impact on Afghan support for international forces.<sup>29</sup> The question remains as to how members of a coalition measure collateral damage and ultimately the emphasis that is to be placed on the “right to life” of uninvolved civilians. This, in turn, raises fundamental questions regarding the applicability of human rights norms in the interpretation of international humanitarian law.

From a legal perspective, resolving the interface between the law governing armed conflict and human rights law may be the most significant challenge facing operational lawyers of all our nations. We are trained and schooled in State-on-State conflict and struggle over issues such as how collateral damage is to be assessed when it results from the reverberating or “knock on” effects of attacks against electrical grids. In the three-block wars,<sup>30</sup> occupations and other complex security situations of the twenty-first century, military forces are confronted with fighting dangerous, perfidious and exceedingly violent armed groups, while at the same time interfacing with a civilian population who may oppose or support the insurgent forces. This raises questions of whether assessments of collateral damage under these circumstances are impacted by the human rights/law enforcement notions of “capture rather than kill” and a more strict assessment of proportionality that demands operations be “planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, any risk to the lives of the [civilians].”<sup>31</sup>

While there has been no definitive articulation of the degree to which human rights law impacts on Canadian Forces international operations, it is clear that the International Court of Justice in the *Nuclear Weapons*<sup>32</sup> and *Wall*<sup>33</sup> cases have determined that human rights law continues to operate during armed conflict, subject to the application of humanitarian law as a *lex specialis*. Further, it is unlikely that the Canadian position would ignore Comment No. 31 of the United Nations Human Rights Committee, which, while not binding as a matter of law, would be persuasive.<sup>34</sup> That Comment indicates that the International Covenant on Civil and Political Rights (ICCPR)<sup>35</sup> would apply in situations where “the rules of international humanitarian law are applicable.”<sup>36</sup>

While the Canadian approach to accepting whether human rights norms can apply to international operations may be different than that of the United States,

the practical effect is likely the same, particularly when the *lex specialis* of the laws governing armed conflict is applied. Canada has accepted the application of human rights-based norms regarding the treatment of detainees reflected in Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I (which itself reflects the ICCPR norms). This approach would appear to resonate with that taken by the US Supreme Court in *Hamdan*.<sup>37</sup>

More difficult and pressing questions for many of our military forces regarding the application of human rights norms relate to the extraterritorial reach of domestic courts and what, if any, impact those norms may have on the use of force. Many Western nations are confronted with litigation regarding the extraterritorial application of human rights (or civil rights) to matters relating to armed conflict. This can occur for a number of reasons, including the complex nature of the campaigns against terrorism and non-State entities, and the relative weakness of accountability frameworks under humanitarian law in comparison to human rights law. The impact of “globalization” cannot be discounted; we live and fight in a far more interconnected world that is breaking down previous boundaries. This may simply be one more casualty of the information age.

Domestic courts in the United Kingdom and the European Court of Human Rights have struggled with this issue. Canada is no exception. Presently, there is litigation in our Federal Court commenced by Amnesty International Canada and a provincial civil liberties association challenging the transfer of detainees taken in Afghanistan to Afghan authorities on the basis of a claim that they are subjected to torture. The application is not only focused on the Afghan treatment of detainees but also states that “[t]here are also substantial grounds to believe that the United States of America is engaged in cruel, degrading and inhuman treatment of detainees, including torture, which is contrary to assurances the US has given to other governments, including Canada.”<sup>38</sup> The applicants are relying not only on international law, but also claim that Canada’s domestic Charter of Rights and Freedoms applies to the transfer of detainees outside of Canada in other countries. I will not say anything further as the matter is before the courts, but this is yet another indication of how human rights claims, including domestic law, has the potential to impact on contemporary operations.

As I have already indicated, the reach and effect of human rights norms are not limited to the issue of the handling of detainees. This is evidenced in the recent Israeli Supreme Court, sitting as the High Court of Justice, decision, termed as the *Targeted Killing* case.<sup>39</sup> The Court applied the human rights law principle of preferring arrest over killing as “the means that should be employed” even when the “target” is someone taking a direct part in hostilities.<sup>40</sup> The position that a civilian cannot be attacked at such time as he or she is taking part in hostilities “if less harmful means

can be employed” is held to be based on “internal law” of the State.<sup>41</sup> The rule is not an absolute as its application is linked to the degree of control exercised by the military. Further, specific reference is made to the possibility that the option of arrest may not exist at all where “at times it involves a risk so great to the lives of the soldiers.”<sup>42</sup>

The application of this case may be somewhat limited by the specific situation regarding occupation facing Israeli authorities. Further, it is not clear how it would be applied in a struggle against organized armed groups in a more traditional conflict setting. Perhaps the most interesting aspect of this “blended” approach is that, notwithstanding the reliance on human rights law, there remains substantial resonance with humanitarian law. For example, it is possible to contemplate a scenario in a built-up urban area controlled by the security forces where an attempt to neutralize relatively low-level insurgents could lead to a determination that even under the humanitarian law principle of proportionality (i.e., taking “all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”<sup>43</sup>) the result would be a decision to capture rather than kill an opponent.

In the conduct of coalition operations there is the potential for considerable misunderstanding among the “partners.” One such issue that immediately strikes me is the Canadian approach to the use of force in the defense of property. Put simply, the use of deadly force to defend property generally is not permitted. This arose out of the “Somalia Affair,” where Canadian troops fired on Somalis who ran away when discovered attempting to breach the wire to steal property. As I once explained to one of our soldiers, we do not permit the killing of people for stealing a watch even if it is right off your arm. However, we have, for operations short of armed conflict, provided greater authority to use force to protect designated mission-essential property. In respect to combat operations, the use of force is largely governed by the laws governing armed conflict, which permit the use of force to destroy and defend property under appropriate circumstances. Indeed, our rules of engagement have been quite robust throughout the conduct of operations since 2001.

Finally, I want to briefly address investigations in a coalition environment. This is taking up an increasing amount of commander and legal officer time in an operating environment that demands greater accountability. It has reached the point where additional training is provided for Canadian legal officers in this area. From a Canadian perspective this has included “blue-on-blue” engagements. One example is the friendly fire incident of April 17, 2002 at Tarnak Farm where a US Air Force F-16 mistakenly killed four and wounded eight Canadian soldiers. In

September 2006 there was a tragic incident in which a US A-10 Warthog called in to provide close air support for a Canadian infantry company in Afghanistan killed one soldier and wounded thirty. There was a further incident at Forward Operating Base Robinson in Afghanistan where both a US and a Canadian soldier were killed during a firefight. That case is being investigated as a possible “blue-on-blue” incident. In each case, the cooperation between US and Canadian authorities has, from my perspective, been exceptional. The air incidents have involved both joint US-Canada investigations (Canadian-American copresidents) and Canadian national inquiries. While the most recent investigations are still being finalized, it is clear that this cooperative effort has had a positive effect so far on interoperability, as well as public perception.

In summary, coalition operations present challenges, but none of them to date have been true “show stoppers.” As a general comment, it would appear that one of the strengths of international law and treaties, such as the Geneva Conventions, is that they provide a common reference for all participants. As nations committed to the rule of law, this common understanding, even when impacted by national interpretations, has held all our countries in good stead. It does not mean that there will be no differences, however; the threats we face are global, which in turn demand international cooperation.

### *Notes*

1. See Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing*, 15 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 281, 291–94 (2005).
2. Neil Brown, *Issues Arising from Coalition Operations: An Operational Lawyer’s Perspective*, and Vicki McConachie, *Coalition Operations: A Compromise or an Accommodation*, which are Chapters XI and XII, respectively, in this volume, at 225 and 235.
3. 18 US Code sec. 1385 (2000).
4. The use of the armed forces in support of law enforcement is set out in both statutes, i.e., The Emergencies Act, R.S., Ch. 22 (4th Supp. 1985) and the National Defence Act, R.S., Ch. N-5 (1985) and by the exercise of the Crown prerogative, i.e., Canadian Forces Armed Assistance Directions, P.C. 1993-624 (Mar. 30, 1993).
5. See Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795–96 (2006), available at <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>, at 66–68.
6. The Public Committee Against Torture in Israel et al. v. The Government of Israel et al., HCJ 769/02 (Dec. 13, 2006).
7. See Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 149, 154–56 (2005); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* FLETCHER FORUM OF WORLD AFFAIRS, Summer/Fall 2003, at 55, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PWELF/\\$File/Rona\\_terror.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PWELF/$File/Rona_terror.pdf) (last visited Apr. 17, 2008).

8. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, all *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 197, 222, 244 and 301, respectively.

9. This does not mean that the law enforcement regime does not apply where appropriate. For example, in Canada terrorist activity is dealt with under Canadian domestic law. It has included the arrest of terrorism suspects alleged to be involved in planning a bomb attack that was “potentially three times more devastating than the Oklahoma City bombing.” See Sasha Nagy, *Massive Terror Attack Averted: RCMP*, GLOBEANDMAIL.COM, June 3, 2006, [http://www.theglobeandmail.com/servlet/story/RTGAM.20060603.wwarrants0603\\_3/BNStory/National/home](http://www.theglobeandmail.com/servlet/story/RTGAM.20060603.wwarrants0603_3/BNStory/National/home).

10. See The Avalon Project at Yale Law School, *Webster-Ashburton Treaty – The Caroline Case*, <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm> (last visited Apr. 17, 2008).

11. HUMAN SECURITY CENTRE, HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21ST CENTURY 23 (2005), available at [http://www.humansecurityreport.info/HSR2005\\_PDF/Part1.pdf](http://www.humansecurityreport.info/HSR2005_PDF/Part1.pdf).

12. RUPERT SMITH, THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD (2005). See also THOMAS X. HAMMES, THE SLING AND THE STONE 1–15 (2006) (for a discussion of the four generations of warfare).

13. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxix (2005).

14. See, e.g., Timothy L.H. McCormack, *An Australian Perspective on the ICRC Customary International Humanitarian Law Study*, in THE LAW OF WAR IN THE 21ST CENTURY: WEAPONS AND THE USE OF FORCE 81 (Anthony M. Helm ed., 2006) (Vol. 82, US Naval War College International Law Studies); Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, in *id.* at 99.

15. See Kenneth Watkin, *21st Century and International Humanitarian Law: Status Quo or Change?*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 265 (Michael N. Schmitt and Jelena Pejic eds., 2007).

16. See Kirby Abbott, “Terrorists: Criminals, Combatants or . . . ?” *The Question of Combatancy*, in CANADIAN COUNCIL ON INTERNATIONAL LAW, THE MEASURES OF INTERNATIONAL LAW: EFFECTIVENESS, FAIRNESS AND VALIDITY 366, 372 (2004) (for reference to the Letter to President of the UN Security Council from the Canadian Ambassador to the UN, October 24, 2001).

17. *Canada’s Stay in Afghanistan Extended by 2 Years*, CBCNEWS.CA, May 17, 2006, <http://www.cbc.ca/story/canada/national/2006/05/17/afghandebate05172006.html>.

18. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 422 [hereinafter Additional Protocol I].

19. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 INTERNATIONAL LEGAL MATERIALS 1507, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 648.

20. See Watkin, *supra* note 1, at 289–90.
21. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 87 (2004).
22. Watkin, *supra* note 1, at 301–309 (for a discussion of the American and Canadian approaches toward defining “military objectives”).
23. See Rebecca Grant, *The Redefinition of Airpower*, 86 AIR FORCE MAGAZINE, Oct. 2003, at 32, available at <http://www.afa.org/magazine/oct2003/1003strategic.pdf>.

The strategic air campaign of Operation Iraqi Freedom was guided by a philosophy wholly different from what had come before. It was one of a handful of distinct air battles being waged by the air component. Its goals came directly from the broad joint campaign objectives articulated by Rumsfeld and Gen. Tommy R. Franks, commander, US Central Command. It was not crafted to overturn the regime in a single night or to send messages. Planners made no attempt to lace together clever patterns of air strikes in hopes of breaking the “will” of the people or deflating the regime by destroying categories of “strategic” targets it held most dear.

*Id.* at 36.

24. JAMES CORUM & WRAY JOHNSON, AIRPOWER IN SMALL WARS 427 (2003).
25. *Id.* at 429–30.
26. *Id.* at 429.
27. See *Karzai Anger over Civilian Deaths*, BBCNews, May 2, 2007, [http://news.bbc.co.uk/2/hi/south\\_asia/6615781.stm](http://news.bbc.co.uk/2/hi/south_asia/6615781.stm) (“The president told Nato and coalition commanders that the patience of the Afghan people is wearing thin with the continued killing of innocent civilians,” a statement from his office said. “Civilian deaths and arbitrary decisions to search people’s houses have reached an unacceptable level and Afghans cannot put up with it any longer”).
28. See Sarah Holewinski, *Fixing the Collateral Damage*, INTERNATIONAL HERALD TRIBUNE, Mar. 7, 2007, at 8, available at <http://www.iht.com/articles/2007/03/07/opinion/edholewin.php>.
29. See *Afghan Support for Coalition Forces Declines*, JANE’S, [http://www.janes.com/security/international\\_security/news/iwr/iwr070507\\_1\\_n.shtml](http://www.janes.com/security/international_security/news/iwr/iwr070507_1_n.shtml).

As NATO and US forces take the offensive to the militants, violence has increased across the country, and subsequently civilian casualties can also be expected to increase, despite the best efforts to avoid them. This will increasingly damage support for international forces in Afghanistan and further anti-US and anti-NATO demonstrations can be expected to occur, both locally in Herat and in other population centres across the country.

*Id.*

30. See Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINE MAGAZINE, Jan. 1999, at 28, available at [http://www.au.af.mil/au/awc/awcgate/usmc/strategic\\_corporal.htm](http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm) (“Three-block wars” consist of three major operations occurring simultaneously within an urban environment: humanitarian assistance, peace operations and combat operations).
31. Ergi v. Turkey, 1998-IV Eur. Ct. H.R. 1751.
32. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 25 (July 8).
33. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, para. 106 (July 9).
34. See Office of the United Nations High Commissioner for Human Rights, *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to*

*the Covenant* para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?OpenDocument) [hereinafter General Comment 31] (which indicates State parties, including their “forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation,” must respect and ensure the rights laid down in the International Covenant on Civil and Political Rights “to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.” Further, that Covenant “applies situations of armed conflict to which the rules of international humanitarian law are applicable”).

35. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302, reprinted in 6 INTERNATIONAL LEGAL MATERIALS 383 (1966).

36. General Comment 31, *supra* note 34, para. 11.

37. See Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2797 (2006), available at <http://www.supremecourt.gov/opinions/05pdf/05-184.pdf> (A plurality of the Court stated: “Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government ‘regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled’”).

38. Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of Defence Staff for the Canadian Forces et al., amended Notice of Application T-324-07 4 (Feb. 21, 2007).

39. The Public Committee Against Torture in Israel et al. v. The Government of Israel et al., HJC 769/02 (Dec. 13, 2006).

40. *Id.*, para. 40.

41. *Id.*

42. *Id.*

43. Additional Protocol I, *supra* note 18, art. 57(2)(a).

# **PART VI**

**2006 LEBANON CONFLICT**



# XIV

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## “Change Direction” 2006: Israeli Operations in Lebanon and the International Law of Self-Defense

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Michael N. Schmitt\*

**O**n July 12, 2006, Hezbollah launched Operation True Promise, the ambush of Israel Defence Force (IDF) soldiers patrolling the border with Lebanon.<sup>1</sup> Three Israelis were killed and two captured. Four more died in an IDF tank responding to the attack, while an eighth perished as Israeli forces attempted to recover the bodies of the tank crew. Meanwhile, Hezbollah rocket attacks against northern Israeli towns and IDF facilities killed two civilians.

Israel reacted quickly and forcefully with Operation Change Direction. The military action included a naval and air blockade of Lebanon, air strikes throughout the country and, eventually, a major ground incursion into southern Lebanon. As the IDF acted, Israel’s Ambassador to the United Nations transmitted identical letters to the Secretary-General and the Security Council setting forth the legal basis for the operation.

Israel thus reserves the right to act in accordance with Article 51 of the Charter of the United Nations and exercise its right of self-defense when an armed attack is launched against a Member of the United Nations. The State of Israel will take appropriate

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actions to secure the release of the kidnapped soldiers and bring an end to the shelling that terrorizes our citizens.<sup>2</sup>

This article explores and assesses the Israeli justification for Operation Change Direction. Did the law of self-defense provide a basis for the operation? If so, defense against whom—Hezbollah, the State of Lebanon or both? Were the Israeli actions consistent with the criteria for a lawful defensive action—necessity, proportionality and immediacy? Did Operation Change Direction unlawfully breach Lebanese territorial integrity?

In order to frame the discussion, it is necessary to distinguish two distinct components of the international law governing the use of force. The *jus ad bellum* sets normative boundaries as to when a State may resort to force as an instrument of its national policy.<sup>3</sup> Its prescriptive architecture is modest, at least in terms of *lex scripta*.

Article 2(4) of the UN Charter prohibits the threat or use of force in international relations.<sup>4</sup> Only two exceptions to the proscription enjoy universal acceptance. The first is enforcement action sanctioned by the Security Council pursuant to Chapter VII of the Charter. By this linear scheme, the Security Council may declare that a particular action or situation represents a “threat to the peace, breach of the peace, or act of aggression.”<sup>5</sup> Once the declarative condition precedent has been met, it may implement non-forceful remedial measures.<sup>6</sup> Should such measures prove “inadequate,” or if the Security Council believes they would not suffice, “it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”<sup>7</sup> The Security Council does so by authorizing and employing UN-commanded and -controlled forces or by giving a mandate for enforcement action to either a regional organization or individual member States organized as an “ad hoc” coalition (or a combination of the two).

Although the Security Council did employ its Chapter VII authority to enhance the size and mandate of the United Nations Interim Force in Lebanon (UNIFIL) as part of the August 2006 ceasefire,<sup>8</sup> it did not mandate Operation Change Direction, either in July 2006 or at any previous time. Instead, the legal basis for Operation Change Direction submitted by Israel lay in the second express exception to the Article 2(4) prohibition—self-defense.

Article 51 codifies the right of States to use force defensively: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>9</sup> A State acting in self-defense must immediately so notify the Security

Council, a requirement epitomized during Operation Change Direction by Israeli notification on the very day defensive military operations began.<sup>10</sup>

The *jus in bello*, by contrast, governs how force may be employed on the battlefield. It addresses such matters as the persons and objects that may lawfully be targeted, how targeting has to be accomplished, and the protections to which civilians, civilian objects and those who are *hors de combat* are entitled.<sup>11</sup> All sides to an armed conflict must comply with the *jus in bello*; status as an aggressor or a victim in the *jus ad bellum* context has no bearing on the requirement.<sup>12</sup> This article does not address the *jus in bello*.<sup>13</sup>

### *The Prelude*

A basic grasp of the complex historical predicates to the 2006 conflict in Lebanon is essential to understanding Operation Change Direction and its normative context. Southern Lebanon is a predominately Shiite area that has been largely ignored by the Lebanese government. The absence of a strong governmental presence rendered the area susceptible to exploitation by anti-Israeli groups.

Until its expulsion from Lebanon in 1982, the Palestinian Liberation Organization (PLO) used southern Lebanon as a base of operations against Israel.<sup>14</sup> In 1978, a PLO attack on two Israeli busses left thirty-seven dead and scores wounded. The IDF reacted with Operation Litani, an operation designed to force the PLO and other Palestinian armed groups from Lebanese territory south of the Litani River. In response, the Security Council, in Resolutions 425 and 426, called on Israel to withdraw from Lebanon. It also created UNIFIL to monitor the withdrawal, help restore international peace and security, and assist Lebanon in establishing effective authority in the area.<sup>15</sup>

UNIFIL and the Lebanese government proved impotent in deterring further Palestinian attacks.<sup>16</sup> In 1982, the Abu Nidal Organization's attempted assassination of the Israeli Ambassador to the United Kingdom precipitated Operation Peace for Galilee.<sup>17</sup> During the controversial invasion of Lebanon, the IDF ousted Syrian forces from Beirut and expelled the PLO, including its leader Yasser Arafat.<sup>18</sup> Israel established a buffer zone in the southern part of the country, where the IDF remained for the next eighteen years.

The 1982 invasion radicalized many of southern Lebanon's Shiites. Inspired in part by the 1979 Iranian Revolution, they created Hezbollah (Party of God). Trained, armed, financed and logistically supported by Syria and Iran, Hezbollah's manifesto includes the liberation of Jerusalem, the destruction of Israel and the establishment of an Islamic State in Lebanon.<sup>19</sup>

Since its formation, Hezbollah has repeatedly engaged in international terrorism. The catalogue of such acts is long and bloody. It includes the seizure of eighteen US hostages in the 1980s and '90s, the 1983 bombings of the US Embassy and Marine Barracks in Beirut, a 1984 attack in Spain which killed eighteen US service members, the 1985 hijacking of TWA flight 847 (during which a US Navy sailor was murdered), the 1994 bombing of the Israeli Embassy in Buenos Aires, and regular attacks against targets in Israel with bombs, rockets and surface-to-air missiles.<sup>20</sup> Israel twice launched major military operations—Operations Accountability (1993) and Grapes of Wrath (1996)—in response.<sup>21</sup>

In May 2000, Israel ended its occupation of southern Lebanon, a move the Security Council recognized as compliant with Resolution 425.<sup>22</sup> Syria and Lebanon protested, maintaining that the ongoing Israeli presence at Shab'a Farms, seized in 1967, violated the Resolution and amounted to continued occupation of Lebanese territory.<sup>23</sup> In any event, Hezbollah quickly filled the security vacuum created in the wake of the withdrawal and continued to mount attacks against Israeli targets.<sup>24</sup> A declaration by Hezbollah's leader, Sheik Hassan Nasrallah, that "if Jews gather in Israel, it will save us the trouble of going after them worldwide" confirmed the organization's aims.<sup>25</sup>

During this period, Israel repeatedly called on Lebanon to establish control over the south. Likewise, the Security Council regularly stressed the importance of Lebanese action.<sup>26</sup> The demands fell on deaf ears, in part due to the presence of Syrian forces in the country.<sup>27</sup> Lebanese President Emile Lahoud, a Maronite Christian who assumed power in 1998, had seemingly decided to tolerate Hezbollah's presence and activities. In 2004, the National Assembly, acting under Syrian pressure, amended the Constitution to allow extension of Lahoud's term in office for an additional three years.<sup>28</sup> The Security Council reacted in September with Resolution 1559.<sup>29</sup> Jointly sponsored by the United States and France, the resolution called for a Syrian withdrawal and the disarming of Hezbollah, a requirement previously set forth in the 1989 Ta'if Accords ending Lebanese civil war.<sup>30</sup>

The assassination of Rafiq al-Hariri in February 2005 caused the situation to deteriorate dramatically. Al-Hariri, a Sunni, had served as Prime Minister twice, having only resigned the previous October. His assassination, which many believed occurred at the behest of Syria, sparked massive demonstrations. The ensuing political crisis, labeled the "Cedar Revolution," led to the withdrawal of Syrian military forces. At the same time, the United Nations called on the Lebanese government "to double its efforts to ensure an immediate halt to serious violations" of the Blue Line, the "border" (line to which the Israelis withdrew in 2000) between Lebanon and Israel.<sup>31</sup>

In May, an anti-Syrian coalition won elections, but fell short of the National Assembly seats necessary to unseat Lahoud.<sup>32</sup> Hezbollah, together with the Amal Movement and other partners, took over a quarter of the parliamentary seats; two of its members were appointed to cabinet posts in Prime Minister Faud Siniora's government.<sup>33</sup> But the postelection political arrangements proved fragile. In December 2005, the Hezbollah-Amal coalition walked out of the government when the National Assembly agreed to a joint Lebanese-international tribunal to try those accused in al-Hariri's death.<sup>34</sup> Siniora was forced to make concessions to secure Hezbollah's return. In particular, he agreed never to refer to the organization as a "militia" and adopted an official position that "the government considers the resistance a natural and honest expression of the Lebanese people's national rights to liberate their land and defend their honour against Israeli aggression and threats."<sup>35</sup> By characterizing Hezbollah as a resistance group, Siniora effectively conceded the "legal fiction" that the Resolution 1559 requirement for militia disarmament did not apply to the organization.

Despite this victory, Hezbollah had been weakened by the "Cedar Revolution," departure of the Syrians, and Lebanese political in-fighting. It needed to somehow recapture momentum. Terrorist operations against Israel seemed to present a promising prospect for doing so. In November 2005, Hezbollah fired mortars and rockets across the Blue Line against IDF positions and facilities. Its forces also assaulted government offices and IDF positions in Ghajar, purportedly in an attempt to kidnap Israeli soldiers. Other actions against Israel followed.

Hezbollah moved quickly to strengthen its forces and stockpile arms. By mid-summer of 2006, the organization fielded two to three thousand fighters and thousands of rockets, some of which could reach far into Israel. Moreover, Nasrallah had proclaimed that he intended to kidnap Israeli soldiers and use them as bargaining chips in a prisoner exchange; 2006 was to be "the year of retrieving prisoners."<sup>36</sup> The threat was highly credible, for in October 2000, Hezbollah fighters had crossed into Israel and kidnapped three soldiers. Hezbollah killed them, using their bodies as bargaining chips in a 2004 prisoner exchange.<sup>37</sup>

Sensitive to the ominous situation, Kofi Annan and other UN representatives repeatedly called on the Lebanese government to move south and exert control over the border areas.<sup>38</sup> Their concerns proved well founded. When Hezbollah mounted Operation True Promise on July 12, Israel responded with Operation Change Direction. The subsequent exchanges proved heavy. Hezbollah launched 125 rockets on July 13, 103 on the following day, and 100 on the fifteenth.<sup>39</sup> On July 14, a Hezbollah rocket struck an Israeli warship, killing two sailors. The incident was especially noteworthy, for the attack could likely not have been mounted but for radar data provided to Hezbollah from a Lebanese military radar site.<sup>40</sup>

For its part, Israel offered a seventy-two-hour ultimatum for release of the captives and cessation of the rocket attacks.<sup>41</sup> In the meantime, it declared an air and naval blockade of Lebanon, conducted air strikes, and engaged in limited cross-border operations designed to foil rocket launches. Many of the initial targets, such as Rafic Hariri International Airport in Beirut and bridges throughout the country, were lines of communication.<sup>42</sup> Israel hoped to prevent the removal of its kidnapped soldiers by cutting them. By late July, the IDF was moving into southern Lebanon; on August 9, it launched ground operations extending well beyond the border.<sup>43</sup> Two days later, the Security Council passed Resolution 1701, in which it called for “the immediate cessation by Hezbollah of all attacks and the immediate cessation by Israel of all offensive military operations.”<sup>44</sup> A ceasefire agreement soon followed and hostilities ended on August 14. Israeli troops had completely withdrawn from Lebanon by October.

### *The Israeli Legal Justification*

As noted, Israel, in announcing its readiness to take “appropriate” steps to secure the release of its soldiers and force a halt to the rocket attacks, justified its military actions on the basis of self-defense pursuant to Article 51 of the UN Charter. Somewhat precipitously, it pointed the finger of blame at not only at Hezbollah, but also Syria, Iran and Lebanon.

Responsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel. Responsibility also lies with the Government of the Islamic Republic of Iran and the Syrian Arab Republic, which support and embrace those who carried out this attack.

These acts pose a grave threat not just to Israel’s northern border, but also to the region and the entire world. The ineptitude and inaction of the Government of Lebanon has led to a situation in which it has not exercised jurisdiction over its own territory for many years. The Security Council has addressed this situation time and time again in its debates and resolutions. Let me remind you also that Israel has repeatedly warned the international community about this dangerous and potentially volatile situation. In this vacuum festers the Axis of Terror: Hezbollah and the terrorist States of Iran and Syria, which have today opened another chapter in their war of terror.

Today’s act is a clear declaration of war, and is in blatant violation of the Blue Line, Security Council Resolutions 425 (1978), 1559 (2004) and 1680 (2006) and all other relevant resolutions of the United Nations since Israel withdrew from southern Lebanon in May 2000.<sup>45</sup>

In great part, the Israelis attributed Hezbollah's actions to Lebanon on the basis of its failure to control the south. A special Cabinet communiqué issued the day of the Hezbollah attacks noted that "Israel views the sovereign Lebanese Government as responsible for the action that originated on its soil and for the return of the abducted soldiers to Israel. Israel demands that the Lebanese Government implement UN Security Council Resolution 1559."<sup>46</sup> Prime Minister Olmert added a second ground—Hezbollah's participation in the Lebanese government:

This morning's events were not a terrorist attack, but the action of a sovereign state that attacked Israel . . . . The Lebanese government, of which Hizbullah is a member, is trying to undermine regional stability. Lebanon is responsible and Lebanon will bear the consequences of its actions.<sup>47</sup>

The extent to which Israel initially focused responsibility on Lebanon was perhaps best illustrated by IDF Chief of Staff Lieutenant General Dan Halutz's threat to "turn back the clock in Lebanon by 20 years."<sup>48</sup>

A November 2006 UN Human Rights Council report also drew a close connection between Hezbollah and Lebanon. In an analysis of the separate issue of whether an "armed conflict" between Israel and Lebanon existed,<sup>49</sup> the report noted that

in Lebanon, Hezbollah is a legally recognized political party, whose members are both nationals and a constituent part of its population. It has duly elected representatives in the Parliament and is part of the Government. Therefore, it integrates and participates in the constitutional organs of the State . . . .

[F]or the public in Lebanon, resistance means Israeli occupation of Lebanese territory. The effective behavior of Hezbollah in South Lebanon suggests an inferred link between the Government of Lebanon and Hezbollah in the latter's assumed role over the years as a resistance movement against Israel's occupation of Lebanese territory . . . . Seen from inside Lebanon and in the absence of the regular Lebanese Armed Forces in South Lebanon, Hezbollah constituted and is an expression of the resistance ('*mukawamah*') for the defence of the territory partly occupied . . . . Hezbollah had also assumed de facto State authority and control in South Lebanon in non-full implementation of Security Council Resolutions 1159 (2204) and 1680 (2006) . . . .<sup>50</sup>

A Lebanese Cabinet policy statement of May 2005 had similarly characterized Hezbollah as a resistance force. Enhancing the purported relationship was Nasrallah's leadership not only of Hezbollah's military wing, but also of the political wing that was participating in government; neither faction advocated a peaceful solution to the dispute with Israel.

As Israel saber-rattled, Lebanon quickly denied culpability. In July 13 letters to the UN Secretary-General and Security Council President, Lebanon claimed that “the Lebanese Government was not aware of the events that occurred and are occurring on the international Lebanese border” and that “the Lebanese Government is not responsible for these events and does not endorse them.”<sup>51</sup> Two days later, in an “Address to the People,” Prime Minister Siniora again distanced himself from the attacks, denying any prior knowledge thereof.<sup>52</sup> Secretary-General Kofi Annan accepted the Lebanese disclaimer.<sup>53</sup>

Israel quickly backed away from assertions that the July 12 attacks were attributable to Lebanon, at least in the normative context of self-defense. On the sixteenth, the Cabinet issued a communiqué that declared, “Israel is not fighting Lebanon but the terrorist element there, led by Nasrallah and his cohorts, who have made Lebanon a hostage and created Syrian and Iranian enclaves of murder.”<sup>54</sup> Similarly, a Ministry of Foreign Affairs briefing paper prepared shortly before the conflict ended stated that although Lebanon bore responsibility “for the present situation, and consequently . . . could not expect to escape the consequences, . . . Israel views Hamas, Hizbullah, Syria and Iran as primary elements in the Jihad/Terror Axis threatening not only Israel but the entire Western world.”<sup>55</sup> As to Lebanon’s responsibility, the paper deviated from the attitude adopted at the outset of hostilities:

Israel did not attack the government of Lebanon, but rather Hizbullah military assets within Lebanon. Israel avoided striking at Lebanese military installations, unless these were used to assist the Hizbullah, as were a number of radar facilities which Israel destroyed after they helped the terrorists fire a shore-to-ship missile at an Israeli ship.<sup>56</sup>

In fact, Israel assiduously avoided striking Lebanese government facilities and equipment, at least absent an express link to Hezbollah. While the Human Rights Council report referenced earlier cites a number of instances in which the IDF struck Lebanese military targets, the discussion is marked by the paucity of examples—a military airfield, radar installations (recall that Lebanese radar facilitated the anti-ship missile attack of July 14) and a barracks.<sup>57</sup> Given the wherewithal of the Israeli Air Force, the catalogue would undoubtedly have been far lengthier had Israel wished it to engage Lebanon militarily.

Thus, by war’s end, Israel was steering clear of arguments that Hezbollah actions amounted to a Lebanese “armed attack” within the meaning of Article 51. Whether correct as a matter of law, tempering comments on the linkage represented sage policy. First, Israel needed the Lebanese Army to move south to fill the security void its withdrawal would leave if it hoped to avoid another long occupation of

southern Lebanon. Second, little was to be gained in styling Operation Change Direction as a response to a Lebanese “armed attack” because Israeli military operations could more convincingly be legally justified as a direct response to Hezbollah. Third, conflict between States in the volatile Middle East is always potentially contagious; therefore, for practical reasons, it is usually best to avoid portrayal of hostilities as inter-State. Finally, as will also be discussed, the international community gingerly accepted Israel’s need to defend itself against the increasingly frequent Hezbollah attacks. Limiting the finger-pointing to Hezbollah would fit better within the prevailing international frame of reference, an important consideration in light of the fact that the international community’s assistance would likely prove helpful in securing the border areas. It would also avoid a direct conflict with UN Secretary-General Kofi Annan, who early on adopted the position that the Lebanese government had no advance notice of the July 12 attacks and that the Hezbollah actions ran counter to the interests of the Lebanese government and people.<sup>58</sup>

Widespread, albeit cautious, acceptance of the legitimacy of the Israeli defensive response to Hezbollah emerged. It was certainly apparent in the Security Council discussions of July 14.<sup>59</sup> Similarly, Secretary-General Kofi Annan acknowledged “Israel’s right to defend itself under Article 51 of the United Nations Charter.”<sup>60</sup> So too did individual States and their leaders.<sup>61</sup> In the Arab world, Saudi Arabia criticized Hezbollah’s “uncalculated adventures,” a reproach echoed by Jordan, Egypt and the United Arab Emirates.<sup>62</sup> Indeed, Nasrallah complained that such censure made possible the harsh Israeli reaction.<sup>63</sup> Arab support only dissipated in the aftermath of Israel’s July 30 bombing of Qana, during which twenty-eight civilians died.<sup>64</sup> The Group of Eight, which was coincidentally meeting in July, condemned Hezbollah actions and called on Lebanon to assert its “sovereign authority” over the south, while the European Union made clear that it considered the right to self-defense applicable.<sup>65</sup> In the United States, both the Senate and House of Representatives passed resolutions condemning the attacks against Israel.<sup>66</sup> Finally, the Security Council clearly indicated in Resolution 1701 that Hezbollah’s attacks of July 12 had precipitated events.<sup>67</sup>

Such acceptance is an important indicator of the operational code, the unofficial but actual normative system governing international actions.<sup>68</sup> In other words, when seeking to identify the applicable law, it is essential to ascertain how the relevant international actors, especially States, interpret and apply the *lex scripta*. Only then can norms be understood with sufficient granularity to assess an action’s legality. It is to those norms that this analysis turns.

### *Legal Analysis*

Self-defense under Article 51 of the UN Charter was the claimed legal basis for Operation Change Direction. In addition to Hezbollah, Israel initially pointed the finger of blame at Lebanon. This begs the question of whether the attacks and kidnappings of July 12 can be attributed to Lebanon such that Israel was justified in characterizing them as an attack by Lebanon itself.

In that Israel's self-defense justification eventually centered on Hezbollah, and given the international community's seeming acceptance of that position, the issue of an "armed attack" attributable to Lebanon is not determinative. Nevertheless, a colorable argument can be fashioned to the effect that Hezbollah's actions were equally Lebanon's, at least as a matter of law. In particular, Hezbollah's participation in the Lebanese government and the government's apparent recognition of the organization as a legitimate resistance group support such a depiction.

Article 8 of the International Law Commission's Articles of State Responsibility provides that an action carried out "on the instructions of, or under the direction or control of, the State" amounts to an "act of State."<sup>69</sup> Hezbollah's inclusion in the Lebanese government, considered in light of Nasrallah's control over both the organization's political and military wings, is relevant in this regard. Yet, there is no evidence that the Hezbollah parliamentarians or cabinet members directed or were otherwise involved in the attacks, or that the Lebanese government controlled the organization, either directly or indirectly. Neither could Hezbollah be fairly characterized as "an organ which has been placed at the disposal of a State by another State . . . [that exercised] elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority" pursuant to Article 9.<sup>70</sup> Although Hezbollah received significant support from Syria and Iran, those States did not exercise sufficient control over the organization to meet the Article 9 threshold.

Even when actions qualify as acts of State for responsibility purposes, Article 50 bars the use of forceful countermeasures in response to a breach short of an "armed attack" under Article 51 (absent a Security Council mandate).<sup>71</sup> In other words, when assessing the Israeli response, the question is when a non-State armed group's actions can be attributed to a State for *self-defense* purposes.

It has long been recognized that support for non-State armed groups can amount to an armed attack by the State supporter.<sup>72</sup> The International Court of Justice (ICJ) has addressed the subject on multiple occasions. In the 1986 *Nicaragua* judgment, it found that a non-State actor's actions could amount to an armed attack if the group in question was "sent by or on behalf" of a State and the operation, in light of its "scale and effects," "would have been classified as an armed

attack . . . had it been carried out by regular armed forces.”<sup>73</sup> In support of its position, the Court cited Article 3(g) of the General Assembly’s 1974 Definition of Aggression (3314 (XXIX)), which was characterized as reflective of customary international law.<sup>74</sup> The ICJ confirmed this “effective control” standard in its 2005 *Congo* and 2007 *Genocide* decisions.<sup>75</sup>

The *Nicaragua* standard has proven controversial. In 1999, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia rejected it in *Tadic*. At issue was the existence of an international armed conflict in Bosnia-Herzegovina by virtue of the Federal Republic of Yugoslavia’s relationship with Bosnian Serb forces. In finding such a conflict, the Chamber adopted a more relaxed standard than that articulated by the ICJ. For the Chamber, the key was “overall control going beyond mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.”<sup>76</sup> Both the effective control and overall control standards would exclude providing sanctuary or otherwise acquiescing to the presence of terrorists from the ambit of “armed attack.” Since no evidence exists of a substantive Lebanese government link to the July 12 Hezbollah attacks, the relationship between Lebanon and Hezbollah met neither the *Nicaragua* “effective” nor the *Tadic* “overall” control tests.

In 2005, Judge Kooijmans, in his separate opinion in the *Congo* case, noted that the Court had failed to take “a position with regard to the question whether the threshold set out in the *Nicaragua* Judgment is still in conformity with contemporary international law in spite of the fact that that threshold has been subject to increasingly severe criticism ever since it was established in 1986.”<sup>77</sup> He was perceptive. The ICJ ignored the operational code evident in the international community’s reaction to 2001 coalition attacks against the Taliban (the de facto government of Afghanistan). Taliban support for al Qaeda fell far below the bar set in either *Nicaragua* or *Tadic*. Nevertheless, most States approved of Operation Enduring Freedom, with many offering material support.<sup>78</sup> No international organization or major State condemned the operations. On the contrary, a month after launch of operations, the Security Council condemned the Taliban “for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qaida and others associated with them.” Additionally, it expressed support for “the efforts of the Afghan people to replace the Taliban regime.”<sup>79</sup>

Had the operational code for attributing attacks by non-State actors to States been relaxed? The precise parameters of any emergent standard remained unclear because the community reaction to attacks on the Taliban may merely have reflected a sense of relief over ouster of international pariahs, rather than a relaxation

of the norms governing the use of force against States tied to terrorism. But if the bar had been lowered, the new standard could arguably apply to Lebanon. Like the Taliban, the Lebanese government allowed Hezbollah sanctuary when it failed to move south, as it had agreed to do in the 1989 Ta’if Accords, and as the United Nations and Israel had demanded. And with organized armed forces under its control, Lebanon presumably had more capacity to deny sanctuary to Hezbollah than did the Taliban vis-à-vis al Qaeda.

Ultimately, attributing the July 12 attacks to Lebanon is problematic. True, the President had expressed support for Hezbollah, the Cabinet had recognized it as performing legitimate resistance functions, Hezbollah exercised government functions in the south and the failure of Lebanese forces to take control of the area could be characterized as providing sanctuary. On the other hand, the organization was not an organ of government empowered by Lebanese law, there is no evidence that the Hezbollah cabinet ministers participated in the decision to strike Israel and kidnap its soldiers, the government did not direct or control the operations, many Lebanese officials opposed Hezbollah, and the Lebanese government publicly, officially and quickly distanced itself from the attacks.

Israel correctly grasped that there was a much firmer normative foundation on which to base Operation Change Direction—self-defense against Hezbollah itself. Prior to the terrorist strikes of September 11, it might have been plausible to suggest that Article 51 applied only to attacks by State actors.<sup>80</sup> Those conducted by non-State actors lay, so the argument went, in the realm of domestic and international criminal law enforcement.<sup>81</sup>

Article 51, however, contains no reference to whom the offending armed attack must be mounted by before qualifying for a defensive reaction as a matter of law. Similarly, Articles 39 and 42 (which together comprise the other exception to the Article 2(4) prohibition on the use of force) do not limit the source of a threat to the peace, breach of peace or act of aggression to States.<sup>82</sup> Beyond pure textual analysis, the Security Council has never restricted enforcement actions to those directed against States; for instance, it has created international tribunals to prosecute individuals charged with crimes against humanity, war crimes and genocide.<sup>83</sup>

By contrast, Article 2(4) specifically pertains to the use of force by member States in their “international relations” (i.e., relations with other States). This suggests that the drafters were sensitive to the textual scope of the articles. From an interpretive standpoint, it would resultantly be incongruous to add a State “attacker” criterion to the law of self-defense.

A construal of Article 51 which included non-State actor attacks had already been advanced by some members of the academy prior to the attacks of September 11. For instance, Professor Oscar Schachter argued a decade earlier that

[i]t is clear that terrorist attacks against State officials, police or military units are attacks on a State wherever they occur. Attacks on private persons and private property may also be regarded as attacks upon a state when they are intended to intimidate and strike fear in order to compel that state to act, or refrain from political action.<sup>84</sup>

Similarly, Professor Yoram Dinstein has long maintained the right of a State to engage in “extraterritorial law enforcement” against attacks by non-State actors.<sup>85</sup>

Moreover, it must be remembered that the *locus classicus* of the international law of self-defense, the nineteenth-century *Caroline* incident, involved non-State actors.<sup>86</sup> During the 1837 Mackenzie Rebellion in Canada, rebel forces sought refuge in New York state, where they also recruited from among a sympathetic population. On December 20, British forces boarded the *Caroline*, a steamer used for travel between the United States and rebel bases, while it was docked in Schlosser, New York. Of the thirty-three crewmembers and others on board, only twelve survived the onslaught. The attackers set the *Caroline* ablaze and sent it adrift over Niagara Falls.

An exchange of diplomatic notes ensued, with the British claiming that self-defense necessitated the action, particularly in light of the American failure to police its own territory. In 1841, the incident took a strange turn when New York authorities arrested one of the alleged British attackers, a Mr. McLeod, who, while intoxicated, had boasted of participating in the incident. The British demanded McLeod’s release, arguing that he was acting on behalf of the Crown in legitimate self-defense. The arrest resulted in a further exchange of diplomatic notes between Secretary of State Daniel Webster and his British counterparts, in particular Lord Ashburton.<sup>87</sup> The contents of those notes, discussed below, became immortalized as the origin of the modern law of self-defense.<sup>88</sup> Thus, self-defense traces its normative lineage to an attack by a non-State actor.

In any event, it appeared as if the international community’s reaction to the 9/11 attacks had settled the issue. The very day after the terrorists struck, when no one was pointing the finger of blame at any State, the Security Council adopted Resolution 1368, which acknowledged the inherent right of self-defense in the situation.<sup>89</sup> On September 28, the Council reaffirmed 1368 in Resolution 1373.<sup>90</sup> NATO and the Organization of American States activated the collective defense provisions of their respective treaties (which are expressly based on Article 51),<sup>91</sup> and Australia initiated planning to join the United States in military operations pursuant to the ANZUS Pact.<sup>92</sup> Forty-six nations issued declarations of support, while twenty-seven granted overflight and landing rights. State practice seemed to be demonstrating comfort with an operational code extending Article 51 to armed attacks by non-State actors.

Further evidence of this understanding of the scope of self-defense appeared as the US-led coalition responded on October 7 with strikes against al Qaeda (and Taliban) targets. In its notification to the Security Council that it was acting pursuant to Article 51, the United States confirmed that it considered the article applicable to the terrorist group.<sup>93</sup> Subsequent State practice proved supportive. Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey and the United Kingdom provided ground troops.<sup>94</sup> Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey and Uzbekistan allowed US military aircraft to transit their airspace and provided facilities to support operations.<sup>95</sup> China, Russia and Arab States such as Egypt expressed acceptance of Operation Enduring Freedom.<sup>96</sup> The European Union depicted the military operations as “legitimate under the terms of the United Nations Charter and of Resolution 1368 of the United Nations Security Council.”<sup>97</sup> And the Security Council adopted repeated resolutions reaffirming the right to self-defense in the context of the conflict in Afghanistan.<sup>98</sup> It is undeniable that post-9/11 practice demonstrated the applicability of Article 51 to attacks by non-State actors.

Or so it seemed. In 2004, the International Court of Justice appeared to ignore this demonstrable history in its polemical advisory opinion *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territories*.<sup>99</sup> Faced with claims that self-defense justified construction of the Israeli security fence, the Court found Article 51 irrelevant because Israel had not averred that the terrorist attacks the wall was intended to thwart were imputable to a State.<sup>100</sup> Judges Higgins, Kooijmans and Buergenthal rejected the majority position, correctly pointing out the absence in Article 51 of any reference to a State as the originator of an “armed attack,” as well as the Security Council’s self-evident characterization of terrorist attacks as armed attacks in, *inter alia*, Resolutions 1368 and 1373.<sup>101</sup>

Despite this telling criticism, in *Armed Activities on the Territory of the Congo* the Court again failed to address the issue head on, inquiring only into whether a State, the Democratic Republic of the Congo, was responsible for the actions of a non-State actor, the Allied Democratic Forces, such that Uganda could act in self-defense against Congo.<sup>102</sup> In his separate opinion, Judge Kooijmans cogently maintained the position that a non-State actor could mount an armed attack.

If the activities of armed bands present on a State’s territory cannot be attributed to that State, the victim State is not the object of an armed attack by it. But if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its inherent right of self-defence.<sup>103</sup>

Judge Simma criticized the Court on the same basis, chastising it for avoiding its responsibility for clarifying the law in a case directly on point.

Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the “Bush doctrine” justifying the pre-emptive use of force. Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as “armed attacks” within the meaning of Article 51.<sup>104</sup>

International reaction to Operation Change Direction demonstrated that the Court was swimming against the tide of the extant operational code. Although it might have been arguable that the supportive reaction to defensive strikes against al Qaeda (as distinct from law enforcement endeavors) was an anomaly deriving from the horror attendant to the 9/11 attacks, it would be incongruous to analogously dismiss the international community’s seeming acceptance of Israel’s right to act defensively against Hezbollah. What the Court failed to acknowledge is that international law is dynamic, that if it is to survive, it has to reflect the context in which it is applied, as well as community expectations as to its prescriptive content.

While the negotiating records of the United Nations Charter contain no explanation of the term “armed attack,” it would seem logical that hostile actions by non-State actors must, like those conducted by States, reach a certain level before qualifying as an “armed attack.”<sup>105</sup> For instance, in *Nicaragua*, the International Court of Justice excluded “mere frontier incidents” from the ambit of “armed attacks.”<sup>106</sup> Although the exclusion proved controversial,<sup>107</sup> plainly the mere fact that an incident occurs along a border does not disqualify it as an armed attack. As noted by Sir Gerald Fitzmaurice in 1952 in response to a Soviet request to include “frontier incidents” in a proposed Definition of Aggression, “What exactly does this mean? There are frontier incidents and frontier incidents. Some are trivial, some may be extremely grave.”<sup>108</sup> Although a frontier incident of sorts, Hezbollah’s actions on July 12 certainly rise to the level of armed attack.<sup>109</sup> They were planned in advance, complex in the sense of including multiple components (abduction and rocket attacks) and severe (kidnapping, death, destruction of property).<sup>110</sup>

Actions in self-defense against armed attacks, whether from a non-State group such as Hezbollah or a State, are subject to the same core criteria, which trace their roots to the *Caroline* case, discussed *supra*. In one of that incident's diplomatic exchanges, Secretary of State Webster argued that

[u]nder these circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show, upon what state of facts, and what rules of national law, the destruction of the "Caroline" is to be defended. It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada—even supposing the necessity of the moment authorized them to enter the territories of the United States at all—did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.<sup>111</sup>

The three universally accepted criteria of self-defense appear in the extract: 1) necessity ("necessity of self-defence" and "no choice of means"), 2) proportionality ("nothing unreasonable or excessive"), and 3) immediacy ("instant, overwhelming" and "leaving . . . no moment for deliberation"). These requirements matured into, and remain, the normative catechism of self-defense.<sup>112</sup> The International Court of Justice recognized the first two as customary international law in *Nicaragua*,<sup>113</sup> a decade later it applied them to Article 51 self-defense in the advisory opinion *Legality of the Threat or Use of Nuclear Weapons*.<sup>114</sup> The Court has recently confirmed the criteria in *Oil Platforms* (2003)<sup>115</sup> and *Congo* (2005).<sup>116</sup> Immediacy, the third criterion, is irrelevant when assessing Operation Change Direction because the Hezbollah attacks predated the Israeli response and continued throughout the IDF operations.

Conceptually, necessity is a qualitative criterion, whereas proportionality is quantitative. Reduced to basics, necessity requires the absence of adequate non-forceful options to deter or defeat the armed attack in question. This does not mean that non-forceful measures would not contribute to defense of the State. Rather, necessity requires that "but for" the use of force, they would not suffice.

Necessity analysis is always contextual, for the utility of non-forceful measures is situation specific. In the case of Operation Change Direction, a key variable was that Hezbollah—an entity historically resistant to diplomatic, economic and other non-forceful actions and dedicated to the destruction of Israel—had carried out the attacks and kidnappings. Additionally, precedent existed that was directly on point as to the futility of non-forceful measures in circumstances resembling those precipitating Operation Change Direction. Recall the 2000 kidnapping of IDF

soldiers and the use of their bodies in a prisoner exchange. History seemed to be repeating itself.

The most likely alternative to Israeli action was, of course, immediate Lebanese action to 1) control those lines of communication Hezbollah might use to whisk the captives out of the country, 2) recover the soldiers and 3) extend military control over the south such that the area could no longer be used as a base of operations, especially for rocket attacks. However, the necessity criterion does not require naiveté. As noted *supra*, extension of Lebanese government authority into the south had been a cornerstone of the Ta’if Accords ending the civil war in 1989. Further, in Resolutions 1559 (2004) and 1680 (2006), the Security Council had emphasized the urgency of exerting government control throughout the country by disarming and disbanding Lebanese and non-Lebanese militias.<sup>117</sup> Yet, the Lebanese government had done nothing; on the contrary, it appeared that Hezbollah was growing militarily stronger. By the summer of 2006, it had two to three thousand regular fighters, with up to ten thousand reserves.<sup>118</sup> Hezbollah’s arsenal included not less than twelve thousand rockets. Most were short-range Katyushas, but the organization also possessed Iranian-supplied Zelzal-2s, with a range of 210 kilometers, sufficient to strike deep into Israel.<sup>119</sup> It was evident that action by the Lebanese government, particularly given its political disarray over the past year, did not represent a viable alternative to Israeli use of force.

Another possible alternative was deferral to action by the international community, much as Israel had done in 1991 when Saddam Hussein launched Scud missile attacks against Israeli population centers during the “First Gulf War.” However, the situation in 2006 was dramatically different. No friendly forces were engaged against Hezbollah, as the coalition had been with Iraqi forces, and UNIFIL was patently impotent. The two States enjoying influence over Hezbollah, Iran and Syria, offered little promise; the leader of the first had called for the Israel’s destruction,<sup>120</sup> while the latter was technically at war with Israel.<sup>121</sup> Finally, over the years the United Nations had demonstrated a marked inability to resolve matters in the area, Security Council politics generally precluded strong Chapter VII action, and previous UN entreaties to Lebanon and Hezbollah had failed to achieve meaningful results. In any event, the attacks were under way and nothing in Article 51 (or the customary law of self-defense) required Israel to yield to any other entity in defending itself. On the contrary, Article 51 expressly allows a State to act defensively in the face of an armed attack “until the Security Council has taken measures necessary to maintain international peace and security.”<sup>122</sup> The Security Council had taken no such step, nor did it purport to have done so. Operation Change Direction clearly met the necessity criterion of self-defense.

The other relevant self-defense criterion is proportionality. Proportionality deals with the degree of force permissible in self-defense; it allows the application of no more force than required, in the attendant circumstances, to deter an anticipated attack or defeat one that is under way. In other words, while necessity mandates a consideration of alternatives to the use of force, proportionality requires its calibration.

Proportionality is frequently misapplied in one of two ways. First, the degree of force employed by the defender is sometimes assessed through comparison to that used by the aggressor on the basis of a false premise that the former may not exceed the latter. But proportionality requires no such symmetry between the attacker's actions and defender's response.<sup>123</sup> Operation Change Direction is paradigmatic. Although the IDF response exceeded the scope and scale of the Hezbollah kidnappings and rocket attacks manyfold, the only way effectively to have prevented movement of the hostages was to either destroy or control lines of communication. Further, the best tactic for preventing Hezbollah rocket attacks, especially from mobile launchers, was through control of the territory from which they were being launched.

The second common misapplication of the proportionality principle confuses the *jus ad bellum* criterion of proportionality, under consideration here, with the *jus in bello* principle by the same name. The latter prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."<sup>124</sup> It considers the consequences of individual or related operations, not the scope of a response to an armed attack.<sup>125</sup> Proportionality in the *jus in bello* context is fully divorced from that resident in the *jus ad bellum*—the autonomy of the two bodies of law is international law holy gospel.

Most critics of Operation Change Direction in the *jus ad bellum* context focus on the proportionality criterion. The Secretary-General, for example, condemned Israeli operations on the ground that they had "torn the country to shreds," thereby producing results that ran counter to the Israeli need for the Lebanese military to exert its authority over southern Lebanon.<sup>126</sup> Similarly, the European Union warned Israel about acting in violation of the principle.<sup>127</sup>

But recall that to breach the proportionality norm, the defender must do more than reasonably required in the circumstances to deter a threatened attack or defeat an ongoing one. On July 13, Hezbollah fired 125 rockets into Israel. The next day, 103 were launched, with 100 impacting Israeli territory on the fifteenth. The IDF entered Lebanon in force on July 22—a day after 97 rockets had been fired. Nevertheless, the number of rocket attacks actually grew following the Israeli

movement north. In all, Hezbollah rockets killed forty-three civilians and twelve soldiers, while wounding nearly fifteen hundred.<sup>128</sup> It is self-evident, therefore, that, at least vis-à-vis operations designed to stop rocket attacks, Israeli actions were proportionate (indeed, arguably *insufficient*).

More problematic from a proportionality perspective were Israeli operations targeting lines of communication. In particular, the IDF bombed Beirut International Airport, 109 Lebanese bridges and 137 roads, and established air and naval blockades.<sup>129</sup> According to the Israelis, these steps were designed to frustrate any spiriting of the hostages out of the country and to keep Hezbollah from being resupplied.<sup>130</sup> As a general matter of operational art,<sup>131</sup> attacking lines of communication also allows an attacker to isolate the battlefield, an especially useful strategy in Lebanon given the concentration of Hezbollah in the south.

That a nexus existed between the stated objectives and the targets selected is apparent. The Israelis had intelligence that indicated there might be an attempt to remove the hostages from Lebanon and Hezbollah arms had been smuggled into Lebanon from abroad, especially Syria and Iran. Interestingly, though, the lines-of-communication strikes provoked little discussion as to whether the IDF had gone too far in the *jus ad bellum* sense. Instead, debate focused on two *jus in bello* questions: 1) did the targets qualify as military objectives;<sup>132</sup> and 2) even if they did, was the expected harm to civilians and civilian property excessive relative to the anticipated military advantage.<sup>133</sup> The international community also condemned the effect the approach had on humanitarian assistance for the Lebanese civilian population and the movement of displaced persons.<sup>134</sup>

It does not seem possible to portray objectively Operation Change Direction as disproportionate from the *jus ad bellum* point of view. Characterizing an action as disproportionate can be justified on two grounds. First, the action may be so excessive relative to defensive needs that the situation speaks for itself—*res ipsa loquitur*. That was clearly not the case with Operation Change Direction, for Hezbollah continues to conduct anti-Israeli attacks. By definition, therefore, the operation cannot be styled as overly broad, at least absent an argument the Israeli actions were inept.

Moreover, the Hezbollah actions of July 12 must be assessed contextually. The organization had been attacking Israel for a period measured in decades; no indication existed that it would desist from doing so in the future.<sup>135</sup> As noted by Judge Roslyn Higgins, the present President of the International Court of Justice, proportionality “cannot be in relation to any specific prior injury—it has to be in relation to the overall legitimate objective of ending the aggression.”<sup>136</sup> Viewed in this way, the only truly effective objective from the defensive perspective was, as noted

by the Israeli Ambassador to the United States, “Hezbollah neutralization.”<sup>137</sup> The law of self-defense does not require half measures.

Second, an action is disproportionate when a reasonably available alternative military course of action employing significantly lesser force would have successfully met the defensive aims. Allegations of disproportionality are impossible to evaluate in the absence of an asserted viable alternative.

The Report of the Human Rights Council’s Commission of Inquiry exemplifies misapplication of the principle. Although not tasked with conducting a *jus ad bellum* investigation, the group nevertheless opined that

while Hezbollah’s illegal action under international law of 12 July 2006 provoked an immediate violent reaction by Israel, it is clear that, albeit the legal justification for the use of armed force (self-defence), Israel’s military actions very quickly escalated from a riposte to a border incident into a general attack against the entire Lebanese territory. Israel’s response was considered by the Security Council in its resolution 1701(2006) as “offensive military operation”. These actions have the characteristics of an armed aggression, as defined by General Assembly resolution 3314 (XXIX).<sup>138</sup>

In a footnote, the Report noted that self-defense “is subject to the conditions of necessity and proportionality,” citing *Nicaragua* and *Nuclear Weapons* as support.<sup>139</sup> The discussion of the escalation from riposte to general attack implies that the Commission believed a violation of the latter criterion had occurred. Yet, the report failed to explain how a riposte, or even a border action, would have sufficed to meet Israel’s pressing defensive needs. In particular, the Commission did not consider escalation in the context of Hezbollah’s ongoing rocket attacks. Without such granularity, its appraisal was purely conclusory; indeed, absent a mandate to render such an evaluation, it was irresponsible.

Curiously, a normatively more mature review came from Israeli official corners. According to the April 2007 interim report of the Winograd Commission, which Prime Minister Olmert established (and which was approved by the Cabinet) following widespread criticism of the conduct of the war,

The decision to respond with an immediate, intensive military strike was not based on a detailed, comprehensive and authorized military plan, based on carefull [sic] study of the complex characteristics of the Lebanon arena. A meticulous examination of these characteristics would have revealed the following: the ability to achieve military gains having significant political-international weight was limited; an Israeli military strike would inevitably lead to missiles fired at the Israeli civilian north; there was not [sic] other effective military response to such missile attacks than an extensive and prolonged ground operation to capture the areas from which the missiles were fired—which would have a high “cost” and which did not enjoy broad support. These

difficulties were not explicitly raised with the political leaders before the decision to strike was taken.

Consequently, in making the decision to go to war, the government did not consider the whole range of options, including that of continuing the policy of ‘containment’, or combining political and diplomatic moves with military strikes below the ‘escalation level’, or military preparations without immediate [sic] military action—so as to maintain for Israel the full range of responses to the abduction. This failure reflects weakness in strategic thinking, which derives [sic] the response to the event from a more comprehensive and encompassing picture.<sup>140</sup>

Ultimately, the Winograd Commission concluded that the Prime Minister displayed “serious failure in exercising judgment, responsibility and prudence.”<sup>141</sup>

This criticism could be interpreted as reflecting elements of both necessity and proportionality—necessity in the sense that diplomatic and political moves should have been employed, and proportionality in that military action below the “escalation level” might have sufficed. But it is necessary to distinguish between legal violation and strategic failing. The law does not mandate selection of the best option; it requires that the choice made be reasonable in the circumstances as reasonably perceived by the actor at the time. Thus, although the Winograd Interim Report articulated sensible alternatives, the mere existence of such alternatives does not establish a breach of the proportionality criterion. On the contrary, recall that the 2000 incident involving the capture of Israeli soldiers had ended tragically, the Hezbollah missile arsenal had grown since the Israeli withdrawal, the Lebanese Army had failed to deploy south, the Lebanese government was fractured and in disarray, and Hezbollah enjoyed the ability to sit on the border and dictate escalation. The situation had become so complex by the summer of 2006 that no particular course of action was self-evidently optimal.

Assuming, *arguendo*, the Israeli defensive actions were both necessary and proportional, and assuming for the sake of analysis that the Hezbollah attacks cannot be classed as a Lebanese “armed attack,” the question of whether Israel had the right to cross into sovereign Lebanese territory to conduct counterterrorist operations remains. The conundrum is the existence of conflicting international law rights—Israel’s right of self-defense, discussed *supra*, and Lebanon’s right of territorial integrity.<sup>142</sup>

Territorial integrity lies at the core of the State-centric international legal architecture, and, thus, the general inviolability of borders is well entrenched in international law. Indeed, the UN Charter’s *sine qua non* principle, the prohibition on the use of force found in Article 2(4), expressly bars cross-border uses of force by singling out territorial integrity.<sup>143</sup> On the other hand, self-defense is no less a

cornerstone of international law; it represents the sole use of force unambiguously permitted without Security Council sanction.

Beyond possessing rights, States also shoulder obligations in international law. Of particular relevance with regard to Operation Change Direction is the duty to police one's own territory to preclude its use to the detriment of other States. As John Basset Moore noted in the classic 1927 Permanent Court of Justice case, *The S.S. Lotus*, “[I]t is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people.”<sup>144</sup> The International Court of Justice reaffirmed this obligation in its very first case, *Corfu Channel*.<sup>145</sup> In relevant part, the underlying incident involved two British warships which struck mines in Albanian waters while transiting the Corfu Strait. The Court concluded that since the mines could not have been laid without its knowledge, Albania bore responsibility based on “certain general and well recognized principles,” including “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of others.”<sup>146</sup> The Court reiterated the point in *United States Diplomatic and Consular Staff in Tehran*, which involved seizure by Iranian radicals of the US embassy in Tehran and consulates in Tabriz and Shiraz, as well as the taking hostage of American diplomats and other citizens.<sup>147</sup> There, the Court held that Iran’s failure to protect the diplomatic premises and subsequent refusal to act to free the hostages violated its “obligations under general international law.”<sup>148</sup>

Soft-law instruments further support an obligation to police one’s territory. For instance, the International Law Commission’s 1954 *Draft Code of Offences against the Peace and Security of Mankind* labels “the toleration of the organization of . . . [armed] bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State” an offense against “the peace and security of mankind.”<sup>149</sup> Similarly, General Assembly 2625 (1970), *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, provides that

[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.<sup>150</sup>

In terms of State practice, the most useful contemporary reference point is al Qaeda’s use of Afghanistan as a base of operations. In 1999, the Security Council imposed sanctions on the Taliban government for, in part, granting sanctuary to

Osama bin Laden and for permitting al Qaeda “to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations.”<sup>151</sup> It insisted that the Taliban

cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice.

Included was a specific demand that the Taliban turn over Osama bin Laden.<sup>152</sup> The following year, the Council levied additional sanctions after the Taliban failed to expel al Qaeda; it established a sanctions-monitoring mechanism in 2001.<sup>153</sup>

Of even greater normative weight was the absence of international condemnation when the United States attacked Afghanistan after the Taliban failed to heed post-9/11 warnings to turn over Bin Laden and rid the country of terrorists.<sup>154</sup> While, as discussed, the legitimacy of translating the non-reaction into a new norm regarding State support of terrorism is questionable, it is certainly evidence of a community conviction that Afghanistan had not met its obligations to police its territory.

Given the aforementioned hard law, soft law and State practice, any formula for resolving a conflict between one State’s right to self-defense and another’s right of territorial integrity must include the fact that the need for conducting the defensive operations arises only when the latter fails to meet its policing duties. But territorial integrity must equally be factored into the formula. Therefore, before a State may act defensively in another’s territory, it must first demand that the State from which the attacks have been mounted act to put an end to any future misuse of its territory.<sup>155</sup> If the sanctuary State either proves unable to act or chooses not to do so, the State under attack may, following a reasonable period for compliance (measured by the threat posed to the defender), non-consensually cross into the former’s territory for the sole purpose of conducting defensive operations. The victim State may not conduct operations directly against sanctuary State forces and must withdraw as soon as its defensive requirements have been met.<sup>156</sup> Since the victim State has a legal right to act defensively, the sanctuary State may not interfere with the defensive operations so long as they meet the aforementioned criteria. If it does, it will have itself committed an armed attack against which the victim State may use force in self-defense.

This proposition is far from novel; rather, it is, reduced to basics, the *Caroline* case.<sup>157</sup> Recall that the United Kingdom demanded the United States put an end to the use of its territory by rebel forces. It was only after US authorities failed to comply that British forces crossed the border in a form of self-help. Those forces withdrew immediately on capture and destruction of the *Caroline*. As noted by Lord Ashburton in his correspondence with Secretary of State Webster,

I might safely put it to any candid man, acquainted with the existing state of things, to say whether the military commander in Canada had the remotest reason, on the 29th day of December, to expect to be relieved from this state of suffering by the protective intervention of any American authority. How long could a Government, having the paramount duty of protecting its own people, be reasonably expected to wait for what they had then no reason to expect?<sup>158</sup>

The facts underlying the British actions were even less compelling than those in the instant case. Although New York authorities were sympathetic to the Canadian rebels, they were not in breach of international demands that control be established over the territory in question. Further, the United States was actively enforcing the laws of neutrality.<sup>159</sup>

In their separate opinions in the *Congo* case, Judges Kooijmans and Simma took a stance similar to that presented here. As Simma perceptively noted,

Judge Kooijmans points to the fact that the almost complete absence of governmental authority in the whole or part of the territory of certain States has unfortunately become a phenomenon as familiar as international terrorism. I fully agree with his conclusions that, if armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State, and, further, that it “would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require so.”<sup>160</sup>

How could it be otherwise?<sup>161</sup>

The standards set forth apply neatly to Operation Change Direction. Following its withdrawal from Lebanon in 2000, Israel repeatedly demanded that Lebanon move south to secure the area from Hezbollah and other terrorist attacks. The international community did so as well. However, Lebanon took no steps to put an end to the misuse of its territory; on the contrary, it seemed to embrace, albeit somewhat guardedly, Hezbollah. Either it chose not to police the south or it could not, but whatever the case, it did not, thereby opening the door for Israeli defensive action.

Moreover, Israel moved in a very measured, stepped fashion. Its initial operations were mostly limited to air attacks and the naval blockade. Ground force operations took place only in the border areas. It was not until September 9 that the IDF launched large-scale ground operations into southern Lebanon, and even then they were confined geographically to the area south of the Litani River. Operation Change Direction was also confined temporally. The entire operation lasted a mere thirty-four days, at which point a ceasefire was negotiated that provided for an Israeli withdrawal and, at least in theory, safeguarded Israel's security along its northern border. Finally, although Israel did strike Lebanese military targets, it is at least arguable that the facilities struck supported Hezbollah operations, as in the case of the radar stations used in support of the strike on the Israeli warship.

### *Conclusion*

Operation Change Direction remains a subject of continuing controversy, although most criticism centers on the *jus in bello*. With regard to the *jus ad bellum*, there is relative agreement that Israel had the right to respond to the Hezbollah attacks pursuant to the law of self-defense. Its response comported with the various requirements set forth in that body of law. Hezbollah's Operation True Promise rose to the level of an "armed attack" as that term is understood normatively, and the Israeli response met both the necessity and immediacy criteria. Although disagreement exists over compliance with the criterion of proportionality, when Operation Change Direction is considered in the context of not only the July 12 Hezbollah attacks, but also those which had preceded them and those which likely would have followed, the standard was met.

A colorable argument can be fashioned that Lebanon also bore legal responsibility for the attacks, perhaps even to the extent that it could be treated as having conducted them itself. This is especially so in light of the heightened scrutiny State support of terrorism is subject to in the aftermath of the September 11 attacks against the United States. However, such an argument, which can be questioned as a matter of law, need not be made, for the law of self-defense provided an adequate foundation for the Israeli actions.

In terms of the continuing construction of the normative architecture governing the use of force, Operation Change Direction is relevant in two important regards. First, it serves as further evidence of an operational code extending the reach of self-defense to armed attacks conducted by non-State actors. Despite the apparent unwillingness of the International Court of Justice to acknowledge that the law of self-defense now reaches such actions, State practice demonstrates acceptance by the international community. Second, Operation Change Direction serves as an

excellent illustration of the growing acceptability of cross-border counterterrorist operations when the State in which terrorists are located fails to comply with the duty to police its own territory.

These issues loomed large on the international legal horizon following the attacks of September 11. Reaction to the coalition response, Operation Enduring Freedom, suggested that the international community had come to interpret Article 51 as allowing an Article 51 response against non-State actors, including a non-consensual penetration of another State's territory to carry it out. However, operations against al Qaeda and the Taliban made for weak precedent because both groups were globally reviled. Operation Change Direction, therefore, serves as an important milestone in crystallizing the operational code in such matters.

### **Notes**

1. The title "Operation True Promise" derived from the "promise" by Hezbollah Secretary-General Hassan Nasrallah to capture Israeli soldiers, who would in turn be exchanged for prisoners held by the Israelis. AMNESTY INTERNATIONAL, UNDER FIRE: HIZBULLAH'S ATTACKS ON NORTHERN ISRAEL 1 (Sept. 2006), *available at* <http://www.amnestyusa.org/document.php?lang=e&id=ENGMDE020252006>. For a factual summary of the conflict, see GlobalSecurity.org, Operation Change Direction, <http://www.globalsecurity.org/military/world/war/lebanon-change-of-direction-chron1.htm> (last visited Feb. 12, 2008).

2. Permanent Representative of Israel to the United Nations (Daniel Gillerman), Identical Letters Dated 12 July 2006 from the Permanent Representative of Israel to the United Nations Secretary-General and the President of the Security Council, U.N. Docs. A/60/937, S/2006/515 (July 12, 2006) [hereinafter July 12, 2006 Letters].

3. For a contemporary treatment of the subject, see generally YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (4th ed. 2005). See also IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963).

4. UN Charter art. 2(4). ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.")

5. *Id.*, art. 39.

6. *Id.*, art. 41.

7. *Id.*, art. 42.

8. S.C. Res. 1701, U.N. Doc. S/RES/1701 (Aug. 11, 2006). Resolution 1701 authorized an increase to fifteen thousand troops and expanded the mandate to include monitoring the ceasefire, accompanying and supporting the Lebanese Armed Forces as they deployed south following the Israeli withdrawal, assisting the humanitarian relief effort and the return of displaced persons, assisting the Lebanese government in the demilitarization of the area (except for Lebanese Armed Forces and UNIFIL), and helping to secure the Lebanese borders. *Id.*, para. 11. Resolution 1701 and all UN Security Council resolutions cited *infra* are available at <http://www.un.org/Docs/sc/index.html>; then Resolution; then Year. On UNIFIL, see United Nations Department of Peacekeeping Operations, UNIFIL (Feb. 1, 2008), <http://www.un.org/Depts/dpko/missions/unifil/index.html>.

9. UN Charter art. 51.

10. *Id.* The Israeli government complied with the requirement the day it launched Operation Change Direction. See July 12, 2006 Letters, *supra* note 2.

11. The *jus in bello* is also known as the law of war, the law of armed conflict and international humanitarian law. Excellent contemporary surveys of the subject include YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (2004); A.P.V. ROGERS, LAW ON THE BATTLEFIELD (2d ed. 2004).

12. Common Article 2 to the four 1949 Geneva Conventions provides that the Conventions apply in “all cases of declared war or of any other armed conflict.” Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. Geneva Conventions I, II, III and IV are *reprinted* in DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 197, 222, 244 and 301, respectively. The Preamble to the 1977 Protocol Additional I similarly provides that

the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts pmb., June 8, 1977, 1125 U.N.T.S. 3, *reprinted* in *id.* at 422 [hereinafter Additional Protocol I].

13. On *jus in bello* issues in the conflict, see Israel Ministry of Foreign Affairs, Israel’s War with Hezbollah: Preserving Humanitarian Principles While Combating Terrorism, Diplomatic Note No. 1 (Apr. 2007), at 2 [hereinafter Israel’s War]; Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”: Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006), available at <http://hrw.org/reports/2007/lebanon0907/lebanon0907webcover.pdf>; HUMAN RIGHTS WATCH, WHY THEY DIED: CIVILIAN CASUALTIES DURING THE 2006 WAR (2007); AMNESTY INTERNATIONAL, DELIBERATE DESTRUCTION OR “COLLATERAL DAMAGE”? ISRAELI ATTACKS ON CIVILIAN INFRASTRUCTURE (2006), available at <http://www.amnesty.org/en/library/info/MDE18/007/2006>.

14. Which in turn contributed to the fifteen-year internal conflict (1975–90) between various Lebanese political and religious factions.

15. S.C. Res. 425, U.N. Doc. S/RES/425 (Mar. 19, 1978); S.C. Res. 426, U.N. Doc. S/RES/426 (Mar. 19, 1978).

16. In 1981, Israel launched attacks into Beirut against targets allegedly tied to terrorist attacks. The Security Council condemned the Israeli response and demanded cessation of operations. S.C. Res. 490, U.N. Doc. S/RES/490 (July 21, 1981).

17. There had been prior attacks by Palestinian groups; the attempted assassination of Ambassador Shlomo Argov was merely the final straw for the Israelis.

18. For a discussion of the legal aspects of the operation, see Barry Feinstein, *The Legality of the Use of Force by Israel in Lebanon – June 1982*, 20 ISRAEL LAW REVIEW 362 (1985). The Security Council immediately called for withdrawal of the Israeli forces and respect for the sovereignty of Lebanon. S.C. Res. 508, U.N. Doc. S/RES/508 (June 5, 1982); S.C. Res. 509, U.N. Doc. S/RES/509

(June 6, 1982). In 1983, negotiations led to a peace treaty between Israel and Lebanon, but the Lebanese National Assembly, under Syrian pressure, did not ratify it; the following year Lebanese President Amin Gemayel cancelled the agreement. Jeremy Sharp et al., Lebanon: The Israel-Hamas-Hezbollah Conflict, Congressional Research Service Report for Congress, 35 (Sept. 15, 2006).

19. Audrey Cronin et al., Foreign Terrorist Organizations, Congressional Research Service Report for Congress, 34–35 (Feb. 6, 2004). On Israeli assertions regarding Syrian and Iranian support, see Israel Ministry of Foreign Affairs, Statement by Foreign Ministry Deputy Director-General Gideon Meir (July 13, 2006), <http://mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2006/Statement+by+Foreign+Ministry+Deputy+DG+Gideon+Meir+13-Jul-2006.htm>.

20. Cronin et al., *supra* note 19, at 34–35.

21. Sharp et al., *supra* note 18, at 35.

22. S.C. Res. 1310, U.N. Doc. S/RES/1310 (July 27, 2000). See also the certification of the Secretary-General. The Secretary-General, Report on the United Nations Interim Force in Lebanon (for the Period from 17 January to 17 July 2000), U.N. Doc. S/2000/718 (July 20, 2000); Letter from the Secretary-General to the President of the Security Council, U.N. Doc S/2000/731 (July 24, 2000).

23. Sharp et al., *supra* note 18, at 36. Israel extended its laws to Shab'a Farms in 1981 in an act the Security Council condemned. S.C. Res. 497, U.N. Doc. S/RES/497 (Dec. 17, 1981).

24. For instance in 2002, it murdered five civilians in a roadside shooting. Israel Ministry of Foreign Affairs, Behind the Headlines: The Second Lebanon War – One Year Later (July 12, 2007), available at <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/The+Second+Lebanon+War+-+One+year+later+-+July+2007.htm>.

25. Paul Adams, *Fears Mounting of Another Israeli War with Hezbollah*, GLOBE AND MAIL (Canada), Dec. 13, 2002, at A8.

26. S.C. Res. 1310, *supra* note 22; S.C. Res. 1337, U.N. Doc. S/RES/1337 (Jan. 30, 2001); S.C. Res. 1365, U.N. Doc. S/RES/1365 (July 31, 2001); S.C. Res. 1391, U.N. Doc. S/RES/1391 (Jan. 28, 2002); S.C. Res. 1428, U.N. Doc. S/RES/1428 (July 30, 2002); S.C. Res. 1461, U.N. Doc. S/RES/1461 (Jan. 30, 2003); S.C. Res. 1490, U.N. Doc. S/RES/1490 (July 31, 2003); S.C. Res. 1525, U.N. Doc. S/RES/1525 (Jan. 30, 2004); S.C. Res. 1553, U.N. Doc. S/RES/1553 (July 29, 2004); S.C. Res. 1559, U.N. Doc. S/RES/1559 (Sept. 2, 2004); S.C. Res. 1583, U.N. Doc. S/RES/1583 (Jan. 28, 2005); S.C. Res. 1614, U.N. Doc. S/RES/1614 (July 29, 2005); S.C. Res. 1655, U.N. Doc. S/RES/1655 (Jan. 31, 2006); S.C. Res. 1680, U.N. Doc. S/RES/1680 (May 17, 2006).

27. Not only did Lebanon fail to exert physical control over Hezbollah-controlled territory, it refused to freeze the organization's financial assets. Cronin et al., *supra* note 19, at 36.

28. The National Assembly amended the Constitution to make this possible; previously, the President's term had been limited to six years.

29. S.C. Res. 1559, *supra* note 26.

30. The agreement called for “spreading the sovereignty of the State of Lebanon over all Lebanese territory” through the “disbanding of all Lebanese and non-Lebanese militias” and the delivery of their weapons “to the State of Lebanon within a period of six months.” The Secretary-General, Report pursuant to Security Council Resolution 1559, at 2, U.N. Doc. S/2004/777 (Oct. 1, 2004).

31. The Secretary-General, First Semi-Annual Report of the Secretary-General to the Security Council on the Implementation of Resolution 1559, at 9–10 (2004), U.N. Doc. S/2005/272 (Apr. 26, 2005).

32. Two-thirds.

33. Energy and Water, and Labor.
34. A Special Tribunal (hybrid UN-Lebanese) for Lebanon has been established to address the assassination. S.C. Res. 1664, U.N. Doc. S/RES/1664 (Mar. 29, 2006) (encourages negotiation with Lebanon); S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007) (endorsing annexed agreement).
35. Lebanese Cabinet's Policy Statement of May 2005, extracted in Human Rights Council, *supra* note 13, at 129 n.32.
36. Lara Deeb, *Hizbullah: A Primer*, MIDDLE EAST REPORT ONLINE, July 31, 2006, <http://www.merip.org/mero/mero073106.html>; International Crisis Group, Israel/Palestine/Lebanon: Climbing Out of the Abyss, Middle East Report No. 57, at 10 (July 25, 2006).
37. Israel's War, *supra* note 13, at 2. Indeed, Hezbollah hoped in part to secure the release of prisoners which it asserted had been wrongfully withheld in the 2004 prisoner exchange.
38. The Secretary-General, Report of the Secretary-General on the United Nations Interim Force in Lebanon: For the Period from 22 July 2005 to 20 January 2006 para. 12, U.N. Doc. S/2006/26 (Jan. 18, 2006).
39. Israel's War, *supra* note 13, at 23 app. A (Number of Missiles Fired into Israel by Hezbollah on a Daily Basis).
40. Anthony H. Cordesman, Preliminary "Lessons" of the Israel-Hezbollah War (Center for Strategic & International Studies, Working Draft for Outside Comment, (2d rev. ed. Sept. 11, (2006)); Behind the Headlines: The Second Lebanon War, *supra* note 24.
41. Israel's War, *supra* note 13, at 8
42. A "line of communications" is a "route, either land, water, and/or air, that connects an operating military force with a base of operations and along which supplies and military forces move." Department of Defense, Joint Publication 1-02, Dictionary of Military Terms, amended through Oct. 17, 2007, <http://www.dtic.mil/doctrine/jel/doddict>.
43. The decision to do so was taken by the Israeli Cabinet. Israel Ministry of Foreign Affairs, Political-Military Cabinet Resolution (Aug. 9, 2006), available at <http://www.mfa.gov.il/MFA/Government/Communiques/2006/Political-Security+Cabinet+resolution+9-Aug-2006.htm>. For the Israeli justification of the step, see Israel Ministry of Foreign Affairs, Behind the Headlines: Israel's Counter Terrorist Campaign (Aug. 15, 2006), available at <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Israels+counter+terrorist+campaign+-+FAQ+18-Jul-2006.htm>.
44. S.C. Res. 1701, *supra* note 8.
45. July 12, 2006 Letters, *supra* note 2.
46. Israel Cabinet Secretariat, Special Cabinet Communique—Hizbullah Attack (July 12, 2007), <http://www.mfa.gov.il/MFA/Government/Communiques/2006/Special+Cabinet+Communique+-+Hizbullah+attack+12-Jul-2006.htm>.
47. Press Conference, Prime Minister Ehud Olmert, Lebanon Is Responsible and Will Bear the Consequences (July 12, 2006), <http://www.mfa.gov.il/MFA/Government/Communiques/2006/PM+Olmert+-+Lebanon+is+responsible+and+will+bear+the+consequences+12-Jul-2006.htm>.
48. Chris McGreal, *Capture of Soldiers was "Act of War" says Israel*, THE GUARDIAN (London), July 13, 2006, at 1.
49. The existence of an armed conflict bears on the issue of whether the law of armed conflict applies during the conflict. According to the UN Human Rights Council's Commission of Inquiry on Lebanon, the conflict qualified as an "international armed conflict" to which Israel, Hezbollah and Lebanon were parties. Human Rights Council, *supra* note 13, para. 55.

50. *Id.*, paras. 56–57. Moreover, although done in the context of the *jus in bello*, the Commission of Inquiry found that Hezbollah constituted a “militia” belonging to a party to the conflict within the meaning of Article 4A(2) of the Third Geneva Convention. Geneva Convention III, *supra* note 12, art. 4A(2).

51. Chargé d’affaires a.i. of the Permanent Mission of Lebanon to the United Nations, Identical Letters Dated 13 July 2006 from the Chargé d’affaires a.i. of the Permanent Mission of Lebanon to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2006/518 (July 13, 2006).

52. Prime Minister Fouad Siniora, Address to the Lebanese People (July 15, 2006), <http://www.lebanonunderseige.gov.lb/english/F/eNews/NewsArticle.asp?CNewsID=17>.

53. The Secretary-General, Statement to the Security Council, U.N. SCOR, 61st Sess., 5492d mtg. at 3, U.N. Doc. S/PV.5492 (July 20, 2006) [hereinafter Secretary-General Statement]. At the time, Lebanon was not on the US Department of State’s list of sponsors of terrorism. US Department of State, Office of Coordinator for Counterterrorism, Country Reports on Terrorism ch. 6 (Apr. 28, 2006), available at <http://www.state.gov/s/ct/rls/crt/2005/64337.htm>.

54. Israel Cabinet Secretariat, Cabinet Communiqué (July 16, 2006), available at <http://www.mfa.gov.il/MFA/Government/Communiques/2006/Cabinet+Communique+16-Jul-2006.htm>.

55. Behind the Headlines: Israel’s Counter Terrorist Campaign, *supra* note 43.

56. *Id.* Speaking before the Security Council on July 31, the Israeli Ambassador noted that Israel had “repeatedly been compelled to act not against Lebanon, but against the forces and the monstrosity which Lebanon had allowed itself to be taken hostage by.” U.N. SCOR, 61st Sess., 5503d mtg. at 4, U.N. Doc S/PV.5503 (July 31, 2006).

57. Human Rights Council, *supra* note 13, para. 53.

58. Secretary-General Statement, *supra* note 53.

59. See U.N. SCOR, 61st Sess., 5489th mtg., U.N. Doc. S/PV.5489 (July 14, 2006). China and Qatar labeled the Israeli actions “armed aggression.” *Id.* See also U.N. SCOR, 61st Sess., 5493d mtg., U.N. Doc. S/PV.5493 (Resumption 1) (July 21, 2006).

60. Secretary-General Statement, *supra* note 53. (Although the Secretary-General condemned the scope of the operation.)

61. For instance, the United States, Australia and Canada. Hassan M. Fattah & Steven Erlanger, *Israel Blockades Lebanon; Wide Strikes by Hezbollah*, NEW YORK TIMES, July 14, 2006, at A1; *Israel Acting in Self-defense, Says Howard*, ABC NEWS ONLINE, July 16, 2006, <http://www.abc.net.au/news/newsitems/200607/s1687707.htm>; Jane Taber, *Harper Defends Israel’s Right “to Defend Itself,”* THE GLOBE AND MAIL (Canada), July 14, 2006, at A12.

62. AUGUSTUS RICHARD NORTON, HEZBOLLAH: A SHORT HISTORY 136–37 (2007), citing AL-WATAN, July 14, 2006.

63. NORTON, *supra* note 62, at 137, citing AL-JAZEERA, July 21, 2006.

64. NORTON, *supra* note 62, at 140.

65. Group of Eight, St. Petersburg Summit Statement (July 16, 2006), available at <http://www.america.gov/st/texttrans-english/2006/July/20060716150444uhyggep0.5012432.html>; European Union, EU Council Conclusions on the Middle East (July 17, 2006), available at [http://www.europa-eu-un.org/articles/en/article\\_6125\\_en.htm](http://www.europa-eu-un.org/articles/en/article_6125_en.htm).

66. S. Res. 534, 109th Cong. (2006); H.R. Res. 921, 109th Cong. (2006).

67. S.C. Res. 1701, *supra* note 8. The Council “[e]xpress[ed] its utmost concern at the continuing escalation of hostilities in Lebanon and in Israel since Hezbollah’s attack on Israel on 12 July 2006” (emphasis added). A Secretary-General Report on the United Nations Interim Force in Lebanon similarly recounted that

[t]he crisis started when, around 9 a.m. local time, Hezbollah launched several rockets from Lebanese territory across the withdrawal line (the so-called Blue Line) towards Israel Defense Forces (IDF) positions near the coast and in the area of the Israeli town of Zarit. In parallel, Hezbollah fighters crossed the Blue Line into Israel and attacked an IDF patrol. Hezbollah captured two IDF soldiers, killed three others and wounded two more. The captured soldiers were taken into Lebanon.

The Secretary-General, Report on the United Nations Interim Force in Lebanon to the Security Council 1, U.N. Doc. S/2006/560 (July 21, 2006).

68. It is discerned in part by observing the actual behavior of international elites. An operational code contrasts with a “myth system,” that is, the law that purportedly applies by simple reference to the *lex scripta*. On the distinction, see W. MICHAEL REISMAN & JAMES BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS AND POLICIES OF COVERT ACTION ABROAD IN INTERNATIONAL AND AMERICAN LAW 23–24 (1992); W. MICHAEL REISMAN, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 23–25 (1987); Michael N. Schmitt, *The Resort to Force in International Law: Reflections on Positivist and Contextual Approaches*, 37 AIR FORCE LAW REVIEW 105, 112–19 (1994).

69. International Law Commission, Draft Articles on Responsibility of States for Intentionally Wrongful Acts art. 8, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10(SUPP) (Dec. 12, 2001) [hereinafter Articles of State Responsibility]. Another approach would focus on Article 4, which provides that the “conduct of any State organ shall be considered an act of that State under international law . . . .” Organs include “any person or entity which has that status in accordance with the internal law of the State.” *Id.*, art. 4. By Article 7, this is so “even if [the organ] exceeds its authority or contravenes instructions.” *Id.*, art. 7. Although Hezbollah had seats in the National Assembly and occupied two Cabinet posts, it is untenable to suggest that virtually all Hezbollah members thereby became agents of the State. Note that the Articles of State Responsibility are “soft law,” in that they merely attempt to restate customary law.

70. *Id.*, art. 9. Commentary to the Article provides that “[s]uch cases occur only rarely, such as during a revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative.” JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 114 (2002). On the issue of responsibility, it should also be noted that the International Court of Justice has deemed *ex post facto* endorsement of an action sufficient to attribute the act in question to the State. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24), para. 74. However, in the instant case, the Lebanese government immediately distanced itself from Hezbollah’s July 12 attacks.

71. Articles of State Responsibility, *supra* note 69, art 50.1(a). (“Countermeasures shall not affect . . . [t]he obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.”) Restated, force may only be used in response to another State’s wrong if said force would otherwise be permissible under the Charter, i.e., defensive force in response to an armed attack or actions pursuant to a Chapter VII, Article 42, mandate.

72. See, e.g., HANS KELSEN, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW 88 (1957) (Vol. 49, US Naval War College International Law Studies); see also Hans Kelsen, *Collective Security and Collective Self-Defense under the Charter of the United Nations*, 42 AMERICAN JOURNAL OF INTERNATIONAL LAW 783 (1948).

73. Or “substantial [State] involvement therein.” Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), para. 195 [hereinafter Nicaragua]. In the case, the United States argued that its support for the Contra rebels was justified as collective defense against Nicaragua’s provision of arms and logistical supplies to rebels conducting operations

against El Salvador. The Court rejected the notion that providing supplies and logistic support amounted to an “armed attack” (although it might be unlawful intervention into another State’s internal affairs in violation of Article 2(4) of the UN Charter). *Id.*

74. *Id.*, citing Definition of Aggression, G.A. Res. 3314 (XXIX), Annex, 2319th plen. mtg., U.N. Doc. A/RES/3314 (XXIX) (Jan. 1, 1975).

75. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19), para. 146 (*see also* Separate Opinion of Judge Kooijmans, *id.*, para. 22) [hereinafter Congo]; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), I.C.J., General List No. 91, Feb. 26, 2007, paras. 391–92.

76. Prosecutor v. Tadic, Case. No. IT-94-1, Judgment, Appeals Chamber, July 15, 1999, paras. 120 & 145.

77. Kooijmans Separate Opinion, *supra* note 75, para. 25

78. See discussion in Michael N. Schmitt, *Counter-terrorism and the Use of Force in International Law*, in INTERNATIONAL LAW AND THE WAR ON TERROR 7, 16–18 (Fred Borch & Paul Wilson eds., 2003) (Vol. 79, US Naval War College International Law Studies).

79. S.C. Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001).

80. In a 1949 report commenting on the meaning of the term “armed attack” in the North Atlantic Treaty, the Senate Foreign Relations Committee suggested that the “words ‘armed attack’ clearly do not mean an incident created by irresponsible groups or individuals, but rather an attack by one State upon another.” S. EXEC. REPORT NO. 81-8, at 13 (1949).

81. Indeed, Ian Brownlie argued that even if a non-State actor could mount an armed attack, “[i]ndirect aggression and the incursions of armed bands can be countered by measures of defence which do not involve military operations across frontiers.” BROWNLIE, *supra* note 3, at 279.

82. Use of force pursuant to a mandate of the Security Council. See discussion accompanying notes 5–7 *supra*.

83. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (International Criminal Tribunal for the former Yugoslavia); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (International Criminal Tribunal for Rwanda).

84. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 164 (1991).

85. DINSTEIN, *supra* note 3, at 244–47 (and previous editions). “Extra-territorial law enforcement is a form of self-defense, and it can be undertaken by Utopia against terrorists and armed bands inside Arcadian territory only in response to an armed attack unleashed by them from that territory. Utopia is entitled to enforce international law extra-territorially if and when Arcadia is unable or unwilling to prevent repetition of that armed attack.” *Id.* at 247.

86. See discussion in D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 58–60 (1958); R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 82 (1938).

87. The relevant correspondence is available at Yale Law School Avalon Project, Webster-Ashburton Treaty – The Caroline Case, <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>.

88. McLeod was ultimately acquitted at trial.

89. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

90. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

91. North Atlantic Treaty art. 5, Apr. 4, 1959, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; NATO Press Release (2001) 124, Statement by the North Atlantic Council (Sept. 12, 2001), <http://www.nato.int/docu/pr/2001/p01-124e.htm>; Inter-American Treaty of Reciprocal Assistance art. 3.1, Sept. 2, 1947, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 93; Terrorist Threat to the Americas, Res. 1/01,

Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs, OAS Doc. RC.24/RES.1/01 (Sept. 21, 2001), available at <http://www.oas.org/OASpage/crisis/RC.24e.htm>.

92. Security Treaty, U.S.-Aust.-N.Z., art. IV, Sept. 1, 1951, 3 U.S.T. 3420, 3423, 131 U.N.T.S. 83, 86; Brendan Pearson, *PM Commits to Mutual Defence*, AUSTRALIAN FINANCIAL REVIEW, Sept. 15, 2001, at 9.

93. Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, Oct. 7, 2001, U.N. Doc. S/2001/946, available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/567/85/pdf/N0156785.pdf?OpenElement>.

94. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 237, 248 (2002).

95. *Id.*

96. *Id.*

97. Declaration by the Heads of State or Government of the European Union and the President of the Commission: Follow-up to the September 11 Attacks and the Fight Against Terrorism, SN 4296/2/01 Rev. 2, at 1 (Oct. 19, 2001).

98. E.g., S.C. Res. 1378, *supra* note 79; S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002). Even the Organization of the Islamic Conference appeared to acquiesce. It merely requested that the operations not extend beyond Afghanistan. Daniel Williams, *Islamic Group Offers U.S. Mild Rebuke*, WASHINGTON POST, Oct. 11, 2001, at A21.

99. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9).

100. *Id.*, para. 139.

101. *Id.* at Separate Opinion of Judge Higgins, para. 33; Separate Opinion of Judge Kooijmans, para. 35; Declaration of Judge Buergenthal, para. 6. Moreover, the question in the two International Court of Justice cases differed materially. In *Nicaragua*, the issue was when did a State's support of guerrillas justify imputing their acts to the State such that the victim could respond in self-defense (individually or collectively) directly against the supporter. The Court did not address the issue at hand in the *Wall* case, i.e., whether the actions of a non-State actor justified the use of force directly against that actor in self-defense.

102. Congo, *supra* note 75, paras. 146–47.

103. *Id.*, Separate Opinion of Judge Kooijmans, para. 29.

104. *Id.*, Separate Opinion of Judge Simma, para. 11.

105. The ICJ has distinguished the “most grave” uses of force (armed attacks under Article 51) from “less grave ones,” i.e., those merely in violation of Article 2(4) of the UN Charter. *Nicaragua*, *supra* note 73, para. 191. The Court relied heavily on the General Assembly’s Definition of Aggression Resolution, *supra* note 74, arts. 2, 3. See also *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6), para. 51.

106. *Nicaragua*, *supra* note 73, para. 195. See also *Oil Platforms*, *supra* note 105, para. 72, where the Court found that the mining of a single ship could rise to the level of an “armed attack.” The Court obliquely suggested that a pattern of incidents might exacerbate the severity of a single incident. *Id.*

107. See, e.g., DINSTEIN, *supra* note 3, at 195; William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE JOURNAL OF INTERNATIONAL LAW 295, 300 (2004).

108. Extracts from Speech Delivered in the Sixth Committee of the General Assembly by the Representative of the United Kingdom, Mr. G.G. Fitzmaurice, C.M.G., on January 9, 1952, 1 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 139 (1952).

109. Even by restrictive standards such as Antonio Cassese's "very serious attack." Antonio Cassese, *The International Legal Community's "Legal" Response to Terrorism*, 38 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 589 (1989).

110. Recall that Hezbollah provided a label for the planned actions, Operation True Promise.

111. Letter from Daniel Webster, US Secretary of State, to Lord Ashburton (July 27, 1842), 30 BRITISH & FOREIGN STATE PAPERS 193 (1843); see an earlier recitation of the requirements in Letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington (Apr. 24, 1841), in 29 BRITISH & FOREIGN STATE PAPERS 1840–1841, at 1138 (1857).

112. The International Military Tribunal at Nuremberg cited the standard when rejecting the argument that Germany invaded Norway in self-defense in 1940. International Military Tribunal (Nuremberg), Judgment (1946), 1 INTERNATIONAL MILITARY TRIBUNAL 171, 207, 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 172, 205 (1947); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 905 (1987).

113. Nicaragua, *supra* note 73, para. 194.

114. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), para. 41 [hereinafter Nuclear Weapons].

115. Oil Platforms, *supra* note 105, paras. 43, 73–74, 76.

116. Congo, *supra* note 75, para. 147.

117. S.C. Res. 1559 and S.C. Res. 1680, *supra* note 26.

118. Cordesman, *supra* note 40, at 7.

119. NORTON, *supra* note 62, at 135.

120. See, e.g., Jim Rutenberg, *Bush and Israeli Prime Minister Maintain Tough Front on Iran*, NEW YORK TIMES, Nov. 14, 2006, at A6. (Ahmadinejad was quoted in the Iranian media as saying about Israel, "We will soon witness its disappearance and destruction.")

121. DINSTEIN, *supra* note 3, at 56 (since a bilateral peace agreement has not been concluded).

122. UN Charter art. 51.

123. As noted in a report to the International Law Commission,

It would be mistaken . . . to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result achieved by the "defensive" action, and not the forms, substance and strength of the action itself.

Robert Ago, *Addendum to Eighth Report on State Responsibility*, in [1980] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 13, 69, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1), U.N. Sales No. E81.V.4 (Part 1).

124. Additional Protocol I, *supra* note 12, arts. 51.5(b), 57.2(a)(iii), 57.2(b).

125. Rephrased in the Operation Change Direction context, was the harm to civilians and civilian property that was likely to have been caused during Israeli strikes on lawful military objectives excessive relative to the operational benefits Israeli commanders reasonably hoped to receive therefrom, such that they were disproportionate? Numerous reports on the conflict allege that certain of the Israeli operations did breach this norm. Human Rights Council, *supra* note 13, paras. 317–31; Human Rights Watch, *supra* note 13, at 5; *but see* Israel's War, *supra* note 13, at 11–20; Israel Ministry of Foreign Affairs, Responding to Hizbullah Attacks from Lebanon: Issues of Proportionality (July 25, 2006), available at <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hizbullah+attacks+from+Lebanon+-Issues+of+proportionality+July+2006.htm>.

126. Secretary-General Statement, *supra* note 53, at 3. He further noted that "[b]oth the deliberate targeting by Hizbullah, with hundreds of indiscriminate weapons, of Israeli population

centres and Israel’s disproportionate use of force and collective punishment of the Lebanese people must stop.” *Id.*

127. For instance, the European Union styled the Israeli operations a “disproportionate use of force” on July 13. Fattah & Erlanger, *supra* note 61.

128. See Israel Ministry of Foreign Affairs, Israel-Hizballah Conflict: Victims of Rocket Attacks and IDF Casualties (n.d.), available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizballah/Israel-Hizballah+conflict-+Victims+of+rocket+attacks+and+IDF+casualties+July-Aug+2006.htm>. A total of 116 IDF soldiers were killed during the conflict.

129. Human Rights Council, *supra* note 13, para. 137.

130. *Id.*, para. 146.

131. Operational art consists of the “application of creative imagination by commanders and staffs – supported by their skill, knowledge, and experience – to design strategies, campaigns, and major operations and organize and employ military forces.” Dictionary of Military Terms, *supra* note 42.

132. Military objectives are “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” Additional Protocol I, *supra* note 12, art. 52.2.

133. See *supra* notes 124–25, and accompanying discussion.

134. Human Rights Council, *supra* note 13, para. 138; Secretary-General Statement, *supra* note 53, at 2.

135. That a series of attacks has occurred bears on the proportionality of the response. As Robert Ago noted in a report to the International Law Commission, “If . . . a State suffers a series of successive and different acts of armed attacks . . . , the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating series of attacks.” Ago, *supra* note 123, at 69–70.

136. ROSLYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 232 (1994).

137. He noted, “We will not go part way and be held hostage again. We’ll have to go for the kill—Hezbollah neutralization.” Robin Wright, *Strikes Are Called Part of Broad Strategy: U.S., Israel Aim to Weaken Hezbollah, Region’s Militants*, WASHINGTON POST, July 16, 2006, at A15.

138. Human Rights Council, *supra* note 13, para. 61. The mandate of the Commission was “(a) To investigate the systematic targeting and killings of civilians by Israel in Lebanon; (b) To examine the types of weapons used by Israel and their conformity with international law; and (c) To assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment.” Human Rights Council, Resolution S-2/1, 2d Special Sess., The Grave Situation of Human Rights in Lebanon Caused by Israeli Military Operations (Aug. 11, 2006). This mandate hardly represented an unbiased tasking. Canada, the Czech Republic, Finland, France, Germany, Japan, the Netherlands, Poland, Romania, Ukraine and the United Kingdom voted against the Resolution.

139. Human Rights Council, *supra* note 13, at 131 n.37, citing Nicaragua, *supra* note 73, para. 176 and Nuclear Weapons, *supra* note 114, paras. 42, 44.

140. Israel Ministry of Foreign Affairs, Winograd Commission Submits Interim Report (Apr. 30, 2007), para. 10, available at <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Winograd+Inquiry+Commission+submits+Interim+Report+30-Apr-2007.htm> [hereinafter Interim Report]. See also the announcement accompanying the release of the final report in Hebrew. Council on Foreign Relations (Essential Documents), Winograd Commission Final

Report (Jan. 30, 2008), available at [http://www.cfr.org/publications/15385/winograd\\_commission\\_final\\_report.html](http://www.cfr.org/publications/15385/winograd_commission_final_report.html).

141. Interim Report, *supra* note 140, para. 12e.
142. The conduct of major military operations against non-State armed groups in another State's territory is not unprecedented. For instance, Turkey has repeatedly conducted operations against the Kurdish Workers' Party (PKK) in northern Iraq, including bombing attacks in December 2007 following requests that the United States and Iraq act to stop PKK attacks on Turkey. Sebnem Arsu, *Turkish Warplanes Attack Kurdish Rebel Camps in Iraq*, NEW YORK TIMES, Dec. 27, 2007, at A14. In response to questions on the incidents, a State Department spokesman noted that “[w]e have a common enemy—Turkey, Iraq, and the United States—in the form of the PKK. It's a terrorist organization.” US Department of State Daily Press Briefing, Tom Casey, Deputy Spokesman (Dec. 28, 2007), <http://www.state.gov/r/pa/prs/dpb/2007/dec/98143.htm>.
143. It has been correctly asserted that the Article 2(4) prohibition extends to non-consensual penetrations of a State's territory not otherwise justified within the framework of the Charter. Albrecht Randalzhoffer, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 112, 123 (Bruno Simma ed., 2d ed. 2002).
144. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Moore, J., dissenting on other grounds), citing for support the US Supreme Court case United States v. Arjona, 120 U.S. 479 (1887).
145. Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9). See discussion of the case in BROWNLIE, *supra* note 3, at 283–89.
146. Corfu Channel, *supra* note 145, at 22. The British subsequently swept the strait, justifying their action in Albanian waters as self-help.
147. United States Diplomatic and Consular Staff in Tehran, *supra* note 70.
148. *Id.*, para. 62. Also the Vienna Convention on Consular Relations, Apr. 23, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 and the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.
149. Draft Code of Offences against the Peace and Security of Mankind, [1954] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 150, U.N. Doc. A/CN.4/SER.A/1954/Add.1.
150. G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (Oct. 24, 1970), available at <http://www.un.org/documents/ga/res/25/ares25.htm>. The Resolution was adopted by acclamation.
151. S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999). The sanctions included a ban on flights to and from Afghanistan and an international freeze on Taliban assets.
152. *Id.* The previous year it had also demanded that the “Taliban stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan factions cooperate with efforts to bring indicted terrorists to justice.” S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998). *See also* S.C. Res. 1193, U.N. Doc. S/RES/1193 (Aug. 28, 1998).
153. S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1363, U.N. Doc. S/RES 1363 (July 30, 2001).
154. On September 28, the Security Council adopted Resolution 1373. The Resolution prohibits States from providing “any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists” and obligates them to, *inter alia*,  
[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; [d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe

havens; and [p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.

S.C. Res. 1373, *supra* note 90.

155. The United States did so following the attacks of September 11, 2001, both through Pakistan, which had maintained relations with the Taliban and thereby served as a useful intermediary, and publicly, for example in President Bush's address to a joint session of Congress. Bush demanded that the Taliban “[c]lose immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities” and “[g]ive the United States full access to terrorist training camps, so we can make sure they are no longer operating.” Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1347, 1348 (Sept. 20, 2001). The United States issued a final demand the day before Operation Enduring Freedom began. President's Radio Address, 37 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1429, 1430 (Oct. 6, 2001).

156. On directing actions only against the terrorists, see BOWETT, *supra* note 86, at 56.

157. Caroline, *supra* notes 86–88 and accompanying text.

158. Letter from Lord Ashburton to Mr. Webster, July 28, 1842, 61 PARLIAMENTARY PAPERS (1843); 30 BRITISH & FOREIGN STATE PAPERS 195 (1843).

159. See summary and accompanying letters at Avalon Project, *supra* note 87.

160. Congo, *supra* note 75 (Simma Separate Opinion, para. 12; Kooijmans Separate Opinion, para. 30).

161. This position appears to be increasingly prevalent in academia. In particular, see Randelzhoffer, *supra* note 143, at 802.

A special situation arises if a State is not reluctant but incapable of impeding acts of terrorism committed by making use of its territory. Although such terrorist acts are not attributable to that State, the State victim of the acts is not precluded from reacting by military means against the terrorist within the territory of the other State. Otherwise, a so-called failed State would turn out to be a safe haven for terrorists, certainly not what Arts. 2(4) and 51 of the Charter are aiming at.



# **APPENDIX**

## **CONTRIBUTORS**



# Contributors

*Editor's Note: In order to most accurately portray the events of the conference, the biographical data in this appendix reflects the position in which the authors were serving at the time of the conference, as set forth in the conference brochures and materials.*

**Professor Craig H. Allen** is the 2006–07 Charles H. Stockton Professor of International Law at the US Naval War College and the Judson Falknor Professor of Law at the University of Washington. He joined the University of Washington faculty in 1994, following his retirement from the US Coast Guard. He is a licensed master mariner and a Fellow in the Nautical Institute and the Royal Institute of Navigation. He also serves on the US Navigation Safety Advisory Council and chairs its Rules of the Road Committee. Professor Allen is the author of *Farwell's Rules of the Nautical Road and Maritime Counterproliferation Operations and the Rule of Law*. He is also on the board of editors of the *Ocean Development and International Law* journal.

**Rear Admiral William D. Baumgartner**, US Coast Guard, serves as the Judge Advocate General and Chief Counsel of the Coast Guard. Prior to his current assignment, Rear Admiral Baumgartner served as Chief, Office of Maritime and International Law at Coast Guard Headquarters and headed the US delegation to the Legal Committee of the International Maritime Organization. He has served as the Staff Judge Advocate for the Seventh Coast Guard District in Miami, Florida and as the Chief of Staff for Homeland Security Task Force Southeast, an inter-agency task force charged with planning for and executing Caribbean mass migration deterrence and response operations. Previous legal assignments also include tours at the Eighth Coast Guard District in New Orleans, Louisiana; Coast Guard Maintenance and Logistics Command Pacific in Alameda, California; and Naval Legal Service Office West in San Francisco, California. Prior to joining the Coast Guard's legal program, Rear Admiral Baumgartner specialized in surface operations and served as the Commanding Officer of *USCGC Point Verde* and *USCGC Penobscot Bay*, as a deck officer on *USCGC Dependable*, and as an operations center controller for the Eighth Coast Guard District, where he directed search and rescue, law enforcement and other Coast Guard operations in the Gulf of Mexico.

Captain Neil Brown, Royal Navy, is a logistics officer and lawyer currently serving as the lead Royal Navy lawyer and staff officer for the development of the Armed Forces Act 2006, legislation that will merge the disciplinary systems of the Royal Navy, Army and Royal Air Force. As a logistics officer he served on *HMS Liverpool* and on *HMS York* for deployments to the Persian Gulf and South China Sea, and for counterdrug operations. He also served as Logistics Commander of the aircraft carrier *HMS Illustrious* and Group Logistics Commander for a UK carrier task group that was deployed to the Persian Gulf to enforce the UN sanctions against Iraq. During the deployment the task group was diverted to support UN forces in Sierra Leone. His legal assignments include legal adviser to Commander-in-Chief Fleet and at the United Kingdom's Permanent Joint Headquarters (PJHQ). During his appointment at PJHQ he had the UK legal lead for operational-level coalition planning for Operation Iraqi Freedom and he deployed in 2003 as legal adviser to the UK National Commander for Operations in Iraq. Throughout 2004 at PJHQ he was the senior military legal adviser to the Chief of Joint Operations on UK operations in Iraq and Afghanistan, the UK deployment in support of the UN Mission in the Democratic Republic of the Congo, a noncombatant evacuation from the Ivory Coast and maritime operations, predominantly in the Arabian Gulf and Horn of Africa. Captain Brown's next assignment will be as the Executive Assistant to the First Sea Lord.

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